Petition

81-1713

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RAYMOND MARQUEZ,

Petitioner,

-against-

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the government knowingly used perjured testimony at Marquez' trial and thereby denied him due process of law.

2. Whether the government's violation of Marquez' discovery rights denied him due process of law.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

----------x

RAYMOND MARQUEZ,

Petitioner,

-against-

THE UNITED STATES OF AMERICA,

Respondent.

----------x

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the Second Circuit affirming an order of the District Court, Southern District of New York (Weinfeld, J.) is set forth in the appendix at pp. 137a-143a. The opinion of the District Court denying Marquez' petition for a writ of error coram nobis is set forth in the appendix at pp. 102a-106a.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was

entered on February 4, 1982. This petition was timely filed. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1)

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This case involves the due process clause of the Fifth Amendment to the United States Constitution and the Jencks Act, 18 U.S.C. §3500.

INTRODUCTORY STATEMENT

This case requires Supreme Court review. It involves the knowing use of clearly perjurious testimony at Marquez' trial as well as the suppression of discoverable material which would have exposed this perjury.

While it is true, that both the District Court and the Court of Appeals found that there had been no knowing use by the government of perjured testimony, no deliberate suppression of discoverable material,

and that this discoverable material would not have affected Marquez' trial, none of these conclusions is supported by any fair reading of the record. Instead such a reading can lead only to the conclusion that a shocking denial of Marquez' rights has been perpetrated.

Marquez has long ago completed the sentence imposed in this case and will gain only a slight practical benefit from a reversal of that conviction. However, it is Marquez' position that the serious and offensive nature of the violation of his rights must be aired. This Court represents the last chance to rectify the wrongs perpetrated against him.

STATEMENT OF FACTS

On February 17, 1970, appellant Marquez was charged along with two co-defendants in a three count indictment arising out of

allegations that the three had extorted one Juan Nieves Monserrate by forcing him to travel from New York to Puerto Rico and return with gambling money he had earlier taken there.

Marquez's defense to these charges was based on his claim that Monserrate and his father-in-law, Thomas Alvarez, had stolen money from him; when Marquez confronted Monserrate and Alvarez with this fact, Monserrate agreed voluntarily to return the money. Without any threats or orders from Marquez, Monserrate then went of his own volition to Puerto Rico and returned with the money.

The government's main witnesses at trail were Monserrate and Alvarez. Both had worked during 1969 in Marquez's numbers betting business, making collections on the numbers which had been bet each day and

bringing those collections to a "bank".

On December 7, 1969, Pedro Rivera went to Monserrate's apartment and told him that Marquez wanted to see him. The following day, Monserrate and Alvarez, accompanied by Rivera, met with Marquez and one Anthony Angelet. According to Monserrate and Alvarez, Marquez accused them both of "past-posting", a system for cheating the numbers operation, of at least $11,000 by placing bets after two of the three digits of the winning number had already been determined. Monserrate and Alvarez further testified that Marquez and the other men, upon learning from Monserrate that he had money in Puerto Rico, forced Monserrate, by threatening him with harm, to go to Puerto Rico and bring that money back to New York.

The following day, Monserrate flew to Puerto Rico and on December 10, 1969, he returned to New York with $7,300.00.

Monserrate was met at the airport by FBI agents, who told him that they knew of his encounter with Marquez and asked Monserrate to cooperate with them. Monserrate agreed to do so, and the following morning, shortly after he delivered the money to Marquez, the latter was arrested.

In their direct testimony, both Monserrate and Alvarez insisted that they had not defrauded Marquez, and that Monserrate had therefore gone to Puerto Rico and returned with the money only because Marquez and the other defendants had threatened him:

Q. [on direct examination of Monserrate] Did you ever cheat on this operation?

A. I never cheated.

(T36)[1]

* * *

Q. [on direct examination of Alvarez] Did Raymond [Marquez] say anything to you?

* * *

A. [by Alvarez] He told me that I was to pay him $2300.

* * *

Q. And did he say why you had to pay $2300?

A. Because he said I was robbing him [together] with Papo [Monserrate].

Q. Were your robbing him?

A. No, sir.

(T421)

Because it was essential to the defense to convince the jury that Alvarez and Monserrate had "past-posted", defense counsel sought repeatedly, but unsuccessfully, during the cross-examination of these two

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(1) Numbers preceded by "T" refer to the pages of the trial transcript; numbers preceded by "H" refer to pages of the hearing on Marquez's post-trail motion to set aside the verdict; numbers preceded by "A" refer to petitioner's appendix.

witnesses to get them to change their testimony and admit the fraud:

Q. [on cross-examination of Monserrate]
Mr. Nieves, [Monserrate], did you fix any of those plays whereby you were not entitled to the proceeds of the winnings?

A. No.

Q. Did you at any time place any bet after two digits had been disclosed to you?

A. No.

Q. Wasn't the $800 you had sent on December 7 by your brother, the day before you were accused of cheating, which was almost in the same amount that you were accused of originally, the proceeds of your cheating and fraud?

Q. I didn't cheat at all.

(T176-77)

* * *

Q. Did you want to part with this money?

A. Why should I if it was mine?

(T179)

* * *

Q. At any time were you cheating on your bets?

A. No.

Q. At any time did you put in any bets after two numbers had come out?

A. Well, no. (T231)

* * *

Q. [on cross-examination of Alvarez] Were you calm when he [Marquez] told you you stole money?

A. Yes, I was okay, because I didn't steal anything from him.

(T437)

* * *

Q. ...They [the defendants] accused you of cheating on those bets, but you sayyou didn't do it?

A. That's correct, that I didn't do that, and I don't know anything of that sort.

(T458)

Q. The $2300 that they said you owed them, did they tell you what numbers you fixed and how they arrived at the sum of $2300?

A. I did not fix any one or rob any bank. Whatever I would receive I would turn it in.

(T465)

Monserrate also repeatedly denied that he had confessed the past-posting scheme to Marquez (T132, 147-48, 242-43). Moreover, both of

these witnesses implied that they had never admitted the past-posting scheme to federal agents (T230,445).

F.B.I. agents Canalez and Burrell also testified, corroborating Monserrate's testimony that he had never admitted the past-posting scheme to them:

Q. [to Agent Canalez during cross-examination] Then, of course, in the course of your interview he [Monserrate] told you that he was accused of cheating?

A. Yes, sir.

Q. Did he tell you what tune he was accused of cheating, how much?

A. I believe he said he was accused of taking eleven, thirteen thousand dollars, from the operation.

Q. And did you ask him whether, indeed, he did take that?

A. Yes, sir, I did.

Q. What was his response?

A. He said he had not taken it.

(T366)

* * *

Q. Wasn't the cheating operation by winning or hitting on a number you cheated when you had two numbers you picked already known in advance? Isn't that the same operation by winningthrough advance information and putting it in on a late bet, wasn't that the accusation.

A. Yes, sir, that was the accusation.

Q. And actually the money was won in that

A. No, sir. he said he had won, actually, honestly. He never claimed to hve done what he was accused of doing. (T396)

* * *

Q. [to Agent Burrell on cross-examinaton] What I meant to ask, did he [Monserrate] tell you what the source of this money, how he had accumulated this money? Did you ask him that or did he give you any explanation of how he accumulated this money?

A. He stated that some was from wages, from working, and I don't think he specifically stated that the other proceeds were from this, what he just mentioned, the past-posting.

(T318)

In the face of this testimony directly contradicting their defense, defense counsel were forced

to call one of the codefendants, Pedro Rivera, as a witness to testify that Monserrate and Alvarez had engaged in past-posting, and that Monserrate had admittedthat fact at the meeting on December 8, 1969. Rivera also testified that no threats had been made to Monserrate at that meeting, and that Monserrate had not been told by Marquez or any of the other defendants that he had to travel to Puerto Rico to get the money.

The jury, apparently choosing to credit the government's several witnesses over Rivera on this issue, convicted Marquez and the other defendants of the crimes charged. On February 2, 1971, Marquez was sentenced to a term of imprisonment of three years on each of the three counts, the sentences to run concurrently.

Following the affirmance of his conviction, Marquez filed a motion for a new trial based on newly discovered evidence, alleging inter alia that Monserrate and Alvarez had perjured themselves when they insisted at trial that they had not cheated the gambling operation. At the hearing on that motion, both Monserrate and Alvarez admitted that they had in fact conducted a past-posting scheme, and that they had perjured themselves in denying that fact when they testified at Marquez's trial. Both insisted, however, that they had never admitted the swindle to government agents prior to Marquez' trial:

Q. [to Alvarez] Now prior to going to the flower shop, had you, in any way, cheated the Marquez bolita operation.

A. Yes, because Juan was the one who used to take the envelopes.

(H 117 emphasis supplied)

* * *

Q. [to Alvarez] Now, prior to today, did you tell anyone else in the Government that you know about the cheating or that you knew about the cheating? (H119)

* * *

Q. [to Alvarez] Did you tell any FBI agent, or an attorney at the courthouse here before today [about the past-posting]?

A. No. (H120)

Q. [to Monserrate] Did you tell any of the agents that it was true that you cheated Spanish Raymond?

A. I don't remember exactly if I did. If I did it must have been to the last one when he came to the house later. I think it was at the last -- I told it to Mr. Caffrey.

Q. Are you referring to December 19, 1972 [after Marquez's trial], when Mr. Caffrey.

A. Yes.

* * *

Q. Now you say the first time that you told the truth about this cheating scheme was to Agent Caffrey, is that correct?

A. Yes. (H 71, 89)

F.B.I. Agents Burrell, Brana and Canalez all testified at the

hearing in corroboration of this latter fact. Thus, Agent Burrell testified that to his knowledge Alvarez had not even been interviewed on December 10, 1969:

Q. Now the night that you picked up Monserrate at the airport and brought him back to FBI headquarters, to the best of your knowledge, had Alvarez been brought into the headquarters to be questioned earlier that evening?

A. No, sir, not to my knowledge.

Q. You know nothing about that?

A. No. (H 145-46)

All three agents testified that Monserrate never expressly admitted that he had cheated Marquez:

Q. [to Agent Burrell] If you recall, in any of these conversations did you discuss whether or not Monserrate had in fact cheated Spanish Raymond?

A. The mention of the actual cheating was made, yes.

Q. And did he say anything in regard to it?

A. Mr. Nieves Monserrate never would actually come out and say that he had cheated in so many words. I never had a direct statement from him. (H135)

* * *

Q. [to Agent Brana] Now, during the course of your conversation at the airport, in the car and at the office, did you have a conversation, or do you recall a conversation with Monserrate as to whether or not he in fact cheated Raymond Marquez?

A. I believe that he was asked that question but that he was evasive and never gave a specific answer.

* * * (H 150-51)

Q. [to Agent Canalez] Well, did you press, after questioning Monserrate and not being able to get a direct answer, did you press Monserrate on the point of whether or not he cheated this operation?

A. No, sir, I didn't press him. We asked him about two or three times, to the best of my knowledge, to the best of my recall about this situation.

Q. And what was his response?

A. I recall him saying, "I have been accused of cheating the Spanish Raymond operation." He never did say to me that he did cheat the Spanish Raymond operation.

(H 169)

After hearing this testimony, the trial judge denied Marquez' new trial motion, holding that although Alvarez and Monserrate had perjured themselves at his trial, the government had not been privy to that fact. In any event, the Court further held, even if Monserrate and Alvarez had admitted the past-posting scheme at Marquez' trial, it would not have changed the outcome.[2]

In 1980, in response to an application under the Freedom of Information Act, appellant Marquez received a redacted copy of an F.B.I. report dated December 12, 1969 (a/k/a the "telex" or the "airtel")[3] which had not been disclosed to defense counsel at trial and which indicated that after Monserrate was picked up by

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2 The trial judge's decision denying Marquez's new trial motion is set forth in appellant's appendix at 102a.

3 Set forth in the appendix at 46a

F.B.I. Agents at the airport, he had admitted to them that he had swindled Marquez. Based on this document, Marquez filed the application which forms the basis for the present petition. During the course of the proceedings on that motion, the redacted portion of the Airtel, as well as another F.B.I. report, dated December 10, 1969,[4] which had not been disclosed to the defense at appellant's trial were disclosed to appellant's counsel. These documents established that Alvarez had also been interviewed by F.B.I. Agents (including Agent Burrell) on December 10, 1969, and that, like Monserrate, Alvarez had also admitted the past-posting scheme to them at that time:

> On 12/10/69, Tomas Alvarez, 1662 Park Avenue, New York City, was interviewed at the

4 Set forth in the appendix at 73a.

> NYO in Spanish by Sas H., Curtiss Burrell, William J. Canalez and Paul J. Brana. During the course of this interview, Sa Michael Williamson was also present. Alvarez advised that he had been enlisted by his son-in-law Juan Nieves Monserrat a/k/a "Papo", to assist him in past-posting several numbers in the "Spanish Raymond numbers operation. Alvarez said that he had once a week for the past three weeks past-posted several numbers. Last week, approximately 12/4/69, he past-posted some numbers...
>
> Report of December 10, 1969 at 1, set forth in the appendix at 73a-74a.

* * *

Thomas Alvarez, one six six two Park Avenue, New York City, was identified as "Papo's" father-in-law and was interviewed at the New York Office December ten sixty-nine. Alvarez advised his son-in-law,Juan Nieves Monserrate,also known as "Papo", had gotten him to assist in past-posting several numbers in the Spanish Raymond numbers operation. This had occurred once a week for the past three weeks and resulted in his swindling more than two thousand dollars from the Marquez operation. Nieves had swindled a great deal more. On approximately December four, sixth-nine, he past-posted some additional numbers...

Airtel at 1, set forth in the appendix at 65a.

* * *

Agents were successful in intercepting Nieves [Monterrate] at John F. Kennedy Airport upon his return from Puerto Rico the night of December ten. After a penetrative interview, Nieves finally admitted his involvement in situation as outlined by Alvarez and reluctantly agreedto cooperate. He stated he had recovered seven thousand four hundred thirty five dollars of the money swindled from Marquez and had brought that amount with him. Facts of case were discussed with Assistant United States Attorney Andrew Mahoney, Southern District of New York.

Airtel at 3-4, set forth in the appendix at 46a-47a.

The report of December 10, 1969 also indicated that Alvarez had informed the agents that Monserrate had admitted the past-posting scheme to Marquez (Id. at 2, set forth in the appendix at 76a. Moreover, that report, as well as the airtel, indicated that an F.B.I. informant,

"NY200-C" had also confirmed to the F.B.I. that Monserrate and Alvarez had engaged in past posting.

See also F.B.I. report of December 10, 1969 at 1, set forth in the appendix at 73a.

Nevertheless, the trial judge denied Marquez' motion to vacate his conviction, holding that neither the government's failure to disclose these documents at the time or Marquez' trial nor the numerous perjuries and omissions which they revealed, vitiated Marquez' conviction.[5]

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[5] A copy of the judge's opinion denying the §1651 application is set forth in the appendix at 102a.

REASONS FOR GRANTING THE WRIT

POINT I

THE GOVERNMENT'S KNOWING USE OF PERJURED TESTIMONY AT TRIALDENIED MARQUEZ DUE PROCESS OF LAW

A. The Perjuries

The charges in this case were based on the allegation that Marquez and his two co-defendants had extorted one Juan Nieves Monserrate by forcing him to travel from New York to Puerto Rico and return with gambling money he had earlier taken there. Marquez's defense to these charges was that the money in question had been swindled from him by Monserrate and his father-in-law, Thomas Alvarez, and that once this theft had come to light, Monserrate had agreed voluntarily, without an extortionate threats to return a portion of the money as a settlement. Monserrate

then went of his own volition to Puerto Rico to do so.

Monserrate and Alvarez testified at trial, however, that they had never swindled Marquez. Several agents also took the stand to corroborate this denial by testifying that Monserrate had never admitted any swindle to them.

Unbeknownst to the defense, both Monserrate and Alvarez had admitted that they had swindled Marquez when they were interviewed by F.B.I. agents on December 10, 1969, shortly before Marquez's arrest. Although those admissions had been recorded in several F.B.I. reports, none of those reports were turned over to the defense at trial.

The improprieties in Marquez's trial which those documents revealed - the repeated perjuries by Monserrate and Alvarez, the agents'

failure to bring those perjuries to the Court's attention, and the agents' own false testimony denied Marquez due process. The conviction procured by virtue of these constitutional violations should be set aside.

The F.B.I. reports of December 10 and 12, 1969 which have now been disclosed establish that virtually all of the government's witnesses gave false testimony, both at Marquez's trial and at the post-trial hearing on his motion for a new trial. According to those reports, government witnesses Alvarez and Monserrate both admitted to F.B.I. Agents on December 10, 1969 that they had defrauded Marquez by means of a "past-posting" scheme:

> On 12/10/69, Tomas Alvarez, 1662 Park Avenue, New York City, was interviewed at the NYO in Spanish by Sas H. Curtiss Burrell, William J. Canalez and Frank J. Brana.

During the course of this interview, Sa Michael Williamson was also present.

Alvarez advised that he had been enlisted by his son-in-law Juan Nieves Monserratt a/k/a "Papo", to assist him in past-posting several numbers in the "Spanish" Raymond numbers operation. Alvarez said that he had once a week for the past three weeks past-posted several numbers. Last week, approximately 12/4/69, he past-posted some numbers...

Report of December 10, 1969 at 1, set forth in the appendix at 73a-74a.

* * *

"Tomas Alvarez, one six six two Park Avenue, New York City, was identified as "Papo's" father-in-law and was interviewed at the New York Office December ten, sixty-nine. Alvarez advised his son-in-law, Juan Niedves Monserrate, also known as "Papo", had gotten him to assist in past-posting several numbers in the Spanish Raymond numbers operation. This had occurred once a week for the past three weeks and resulted in his swindling more than two thousand dollars from the Marquez operation. Nieves had

swindled a great deal more. On approximately December four, sixty-nine, he past-posted some additional numbers...

Report of December 12, 1969 at 1, set forth in the appendix at 65a.

* * *

Agents were successful in intercepting Nieves [Monserrate] at John F. Kennedy Airport upon his return from Puerto Rico the night of December ten.

After a penetrative interview, Nieves finally admitted his involvement in situation as outlined by Alvarez and reluctantly agreed to cooperate. He stated he had recovered seven thousand four hundred thirty five dollars of the money swindled from Marquez and had brought that amount with him. Facts of case were discussed with Assistant United States Attorney Andrew Mahoney, Southern District of New York.

Report of December 12, 1969 at 3-4 set forth in the appendix at 46a-47a.

The report of December 10, 1969 also indicated that Alvarez informed the agents that Monserrate had admitted the past-posting scheme to Marquez (Id. at 2, set forth in the appendix at 76a.

These two reports thus established that these witnesses as well as several F.B.I. agents perjured themselves repeatedly in the proceedings in this case. Thus Alvarez, during his direct examination and on three separate occasions during his cross-examination at trial, falsely denied ever having been involved in a scheme to defraud defendant Marquez.

Q. [on direct examination] Did Raymond [Marquez] say anything to you?

A. [by Alvarez] He told me that I was to pay him $2300.

* * *

Q. And did he say why you had to pay $2300?

A. Because he said I was robbing him [together] with Papo [Monserrate]

Q. Were you robbing him?

A. No, sir. (T421)

Q. [on cross-examination] Were you calm when he told you you stole money?

A. Yes, I was okay, because I didn't steal anything from him.

(T437)

Q. ...They [the defendants] accused you of cheating on those two bets, but you say you didn't do it?

A. That's correct, that I didn't do that, and I don't know anything of that sort.

(T458)

Q. The $2300 that they said you owed them, did they tell you what numbers you fixed and how they arrived at the sum of $2300?

A. I did not fix any one or rob any bank. Whatever I would receive I would turn it in.

(T465)

The December 10th and 12th reports also establish that Alvarez

perjured himself, both at trial and at the post trial hearing, when he denied ever having told the agents that he had been involved in past-posting:

Q. And of course, you always denied [to the agents] that you had--the accusation that you stole the money?

A. No, sir, I did not steal money from anybody.

(T445)

Q. Did you ever tell an F.B.I. agent, or an attorney at the courthouse here before today [about the past-posting]?

A. No. (H120)

The December 10th report also establishes that Alvarez perjured himself in other answers which he gave at the trial. Thus, in the December 10th interview, Alvarez told the agents that Monserrate had "told the entire story to Marquez and Angelet in the presence of 'Petie.' At trial,

however, Alvarez gave contrary testimony:

Q. Your son-in-law [Monserrate] admitted [to the defendants] that he stole some money, isn't that correct?

A. No, sir.

(T432)

Similarly, in the December 10th interview, Alvarez told the agents that Marquez and the other defendants had accused Monserrate and himself of stealing by means of the procedure known as "past-posting." At trial, however, Alvarez testified that he did not know how they were supposed to have stolen:

Q. He [Marquez] said this was a fixed bet, isn't that right"

A. No, sir, he says they [sic "we"] were stealing. Now I don't know how they [sic "we"] were stealing or robbing.

(T462)

The December 10th report also establishes that Agent Burrell, one of the agents who interviewed Alvarez on that date (see report at 74a) gave false testimony at the post trial hearing when he testified that to his knowledge Alvarez had not even been interviewed on December 10th:

Q. Now the night that you picked up Monserrate at the airport and brought him back to F.B.I. headquarters, to the best of your knowledge, had Alvarez been brought into the headquarters to be questioned earlier that evening?

A. No, sir, not to my knowledge.

Q. You know nothing about that?

A. No. (H145-46)

It further establishes that Burrell gave false testimony at that hearing when he testified that the first report on this case was not written until the "16th or so of December" (H146). Burrell clearly

knew about the December 10th report since he signed off on the first page of it.

The documents in question also establish that Monserrate perjured himself repeatedly at trial and at the post-trial hearing. Thus, at trial, he repeatedly denied having cheated Marquez:

Q. [on direct examination] Did you ever cheat on this operation?

A. I never cheated. (T36)

Q. Mr. Nieves, did you fix any of those plays whereby you were not entitled to the proceeds of the winnings?

A. No.

Q. Did you at any time place any bet after or bring in any money to the bank after two digits had been diclosed to you?

A. No.

Q. Wasn't the $800 you had sent on December 7 by your brother, the day before you were accused of cheating, which was almost in the same amount that you were accused of originally, the proceeds of your cheating and fraud?

A. I didn't cheat at all.

(T176-77)

Q. Did you want to part with this money?

A. Why should I fit was mine?

(T179)

Q. At any time were you cheating on your bets?

A. No.

Q. At any time did you put in any bets after two numbers had come out?

A. Well, no. (T231)

These documents also establish that Monserrate perjured himself when he testified at both the trial and the post trial hearing that he had not admitted to the agents that he had past-posted:

Q. What were you accused of?

A. That I was being accused of stealing.

* * *

Q. You told us a while ago thatyou concurred [with the agents] it was true. Isn't that what you said?

A. Well, I concurred, but not that I was stealing, but I concurred with the question that the F.B.I. asked me. (T230)

Q. Did you tell any of the agents that it was true that you cheated Spanish Raymond?

A. I don't remember exactly if I did. If I did it must have been to the last one when he came to the houselater. I think it was at the last--I told it to Mr. Caffrey.

Q. Are you referring to December 19, 1972 [after appelant's trial], when mr. Caffrey came up to your house [to investigate the allegations made in appellant's new trial motion]?

A. Yes.

* * *

Q. Now you say the first time that you told the truth about this cheating scheme was to Agent Caffrey, is that correct?

A. Yes. (H71, 89)

The F.B.I. report also suggests that Monserrate was testifying falsely when he insisted that half of the money he had in Puerto Rico came from wages

from legititimate work (T21) and when he repeatedly denied having admitted Marquez that he had cheated (T132, 147-48, 242-43).

Finally, these documents establish that the agents testified falsely at trial and at the post-trial hearing when they claimed that Monserrate never admitted the past-posting scheme to them:

Q. [to Agent Canalez during cross-examination] Then, of course, in the course of your interview he [Monserrate] told you that he was accused of cheating?

A. Yes, sir.

Q. Did he tell you to what tune he was accused of cheating, how much?

A. I believe he said he was accused of taking eleven, thirteen thousand dollars, from the operation.

Q. And did you ask him whether, indeed, he did take that?

A. Yes, sir, I did.

Q. What was his response?

A. He said he had not taken it.

(T366)

* * *

Q. Wasn't the cheating operation by winning or hitting on a number you cheated when you had two numbers you picked already known in advance? Isn't that the same operation by winning through advance information and putting it in on a late bet, wasn't that the accusation.

A. Yes, sir, that was the accusation.

Q. And actually the money was won in that

A. No, sir. He said he had won, actually, honestly. He never claimed to have done what he was accused of doing. (T396)

* * *

Q. [to Agent Burrell on cross-examination] What I meant to ask, did he [Monserrate] tell you what the source of this money, how he had accumulated this money? Did you ask him that or did he give you any explanation of how he accumulated this money?

A. He stated that some was from wages, from working, and I don't think he specifically stated that the other proceeds were from this, what he just mentioned, the past-posting. (T318)

Q. [to Agent Burrell] If you recall, in any of these conversation did you discuss whether or not Monserrate had in fact cheated Spanish Raymond?

A. The mention of the actual cheating was made, yes.

Q. And did he say anything in regard to it?

A. Mr. Nieves Monserrate never would actually come out and say that he had cheated in so many words. I never had a direct statement from him. (H135)

* * *

Q. [to Agent Brana] Now, during the course of your conversation at the airport, in the car and at the office, did you have a conversation, or do you recall a conversation with Monserrate as to whether or not he in fact cheated Raymond Marquez?

A. I believe that he was asked that question but that he was evasive and never gave a specific answer.

* * * (H150-51)

Q. [to Agent Caralez] Well, did you press after questioning Monserrate and not being able to get a direct answer, did you press Monserrate on the point of whether or not he had cheated this operation?

A. No, sir, I didn't press him. We asked him about two or three times, to the best of my knowledge, to the best of my recall about this situation.

Q. And what was his response?

A. I recall him saying, "I have been accused of cheating the Spanish Raymond operation." He never did say to me that he did cheat the Spanish Raymond operation.

(H169)

Since the F.B.I. reports of December 10 and 12, 1969 establish that Alvarez and Monserrate admitted the past-posting scheme to F.B.I. agents on December 10, 1969, it is now clear 1) that Monserrate and Alvarez perjured themselves when they thereafter took the stand at appellant's trial and denied that they had been a party to any such scheme, 2) that the F.B.I. agents who had interviewed them on December 10th knew that this testimony was perjurious but failed to do anything to correct it, and 3) that the agents themselves thereafter gave false testimony to cover up their complicity in those perjuries.

B. The government's knowing use of perjury

In light of the undisputed fact that Alvarez and Monserrate committed numerous perjuries at Marquez's trial, the initial issue is whether the government should be charged with the knowledge of these perjuries when they were committed. No fair reading of the record can excuse the government of its patent, knowing use of perjured testimony.

The opinion of the Second Circuit and the more expansive opinion of the District Court state a number of reasons for the finding that there was no such knowing use of perjury. None of these reasons can withstand analysis.

At the outset, the District Court credited Monserrate's and Alvarez's explanations for their

perjuries; that they were afraid of the consequences of such an admission at the trial. This explanation is preposterous. What we are asked to believe is that Monserrate and Alvarez were not sufficiently afraid of Marquez to prevent their testifying at his trial, but were afraid to admit the cheating. From any viewpoint, the injury caused by the testimony at trial dwarfed any injury arising from the theft. That these witnesses overcame their fear as to putting Marquez behind bars but not as to admitting the cheating simply makes no sense. But there is even a stronger reason not to credit this explanation. When interviewed by Agent Canalez, Alvarez told him that "...Monserrate had told his entire story [the past-posting scheme] to Marquez..." (76a)

If Monserrate had admitted the cheating to Marquez prior to his going to Puerto Rico, there would be no reason to fear making this same admission a second time at trial. Alvarez, who admitted his participation in this scheme, would have had no reason to lie to the agents about Monserrate's confession to Marquez.

Both opinions below then go on to absolve the government of any knowledge of these perjuries. This absolution is performed only through a total distortion of the record.

As to Alvarez, the fact that he told Agent Canalez on December 10, 1969 that he had cheated Marquez cannot be disputed:

> Alvarez advised that he had been entrusted by his son-in-law Juan Nieves Monserrate Area "Papo", to assist him in past-posting several numbers in the "Spanish" Raymond numbers operation. (74a)

It is from Alvarez's admission of the cheating that the Second Circuit opinion begins its convoluted reasoning and its incredibly speculative conclusion that the government had no knowledge that Monserrate had admitted his cheating on December 10, 1969. Essentially, the reasoning of the Second Circuit is that only Alvarez had admitted his cheating and that the phrase in the Airtel of December 10th "the money swindled from Marquez" was not a reference to any admission of Monserrate but was merely the conclusion of the composer of the Airtel based upon what Alvarez had admitted. This chain of reasoning is incredibly convoluted and omits clear

facts[6] to the contrary.

The Airtel itself supplies no comfort to the Second Circuit's position:

> After a penetrative interview, Nieves finally admitted his involvement in the situation as outlined by Alvarez and reluctantly agreed to cooperate. He stated he had recovered seven thousand, four hundred thirty-five dollars of the money swindled from Marquez.
>
> (46a-47a)
> (emphasis supplied)

Even if one accepts that the situation as outlined by Alvarez did not encompass the past-posting, which itself is a strained interpreation,

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(6) If, for example, this petition had been made on behalf of the agents involved after their conviction for perjury and if the Second Circuit's reasoning were presented as establishing that the proof of perjury was not enough to prove the case beyond a reasonable doubt, this Court, or any other, would have no trouble giving it the short shrift it deserves.

the rest of the Airtel is crystal clear.[4] The source of the information is not Alvarez, the phrase "He stated he had..." is a reference to Monserrate. Moreover, the use of the word "recovered", ("He stated he had recovered...") again identifies not only that Monserrate was the source of this information, but also that he had admitted the cheating to the agents after this "penetrative interview". The word "recover" is quite specific.

Thus, to accept the Second Circuit's position, this Court must accept that the paragraph, "...Nieves (Monserrate) finally admitted his involvement...as outlined by

---

(4) The government and the opinions below frequently refer to the significant portion of the Airtel as "the money swindled from Marquez". This cropping omits the identification of the source of this information as Monserrate (i.e., "He stated that...")

Alvarez...He stated he had recovered ...the money swindled from Marquez.", really means, Nieves admitted his being involved in the numbers operation. From information I [the agent making the report] have received from Alvarez, I reach my own conclusion that Monserrate had, in fact, swindled money from Marquez. The above interpretation is a tribute to the inventiveness of man in using his language, but it is hardly a fair, or even close to fair reading.

The Second Circuit's decision goes on to state that the agents were never asked if Alvarez had admitted his cheating (140a), and since no such question had been aksed at the hearing, there could have been no perjury. What this conclusion entirely overlooks is that at the hearing on the original motion to set aside the judgment, counsel asked

whether or not Alvarez was interviewed on the 10th of December. To this question, agent Burnell, one of the agents who interviewed Alvarez on the 10th (see report 74a), stated that Alvarez, to his knowledge, had not even been interviewed on the 10th (H145-146). Of course, the questioning by counsel at this hearing in 1973 preceded by many years the proof that such an interview with Alvarez had occurred. It is a novel approach to say that at the 1973 hearing, after Burnell denied that there had been an interview of Alvarez on December 10, 1969, counsel was required to ask to what Alvarez had admitted at this interview which did not take place.

The government's argument that it cannot be charged with knowing use of perjury since, regardless of what its FBI agents knew as a result

of the admissions made by Monserrate and Alvarez at the December 10th interview, the assistant United States Attorney who prosecuted the case was never personally apprised of these admissions. The district court expressly rejected this argument on the related issue of the government's failure to turn over the FBI reports to defense counsel.

It should also be rejected here. As a matter of law, the prosecutor in a criminal case is assumed to possess the knowledge obtained by his investigative agents in their preparation of that case. Any failure by the agents to convey the admissions made by Alvarez and Monserrate at the December 10th interviews to the prosecutor "cannot be excused as due to a breakdown in channels of communications." United States v. Sperling, 506 F.2d 1323,

1333 (2d Cir. 1974); United States v. Seijo, supra; see also Giglio v. United States, 405 U.S. 150, 154 (1972). Moreover, since the agents were representatives of the government, their own false testimony would constitute government misconduct in violation of Constitutional Due Process even if the prosecutor was not aware of it. And finally, as a practical matter, the government was aware of the perjury by Monserrate and Alvarez since at least one of the agents was in court during much, and perhaps all, of their testimony (T175). Consequently, the government is properly charged with knowledge of the perjuries which occurred throughout these proceedings.

Since the Second Circuit findings regarding the government's knowing use of perjury are contrary to the record in this case, they should be rejected by this Court.

POINT II

THE GOVERNMENT'S SUPPRESSION OF DISCOVERABLE MATERIAL DENIED MARQUEZ DUE PROCESS OF LAW.

A defendant in a criminal proceeding is entitled to the prior statements of a government witness (18 U.S.C. §3500) as well as evidence in the possession of the governmetn which might be favorable to the accused. Brady v. Maryland, 373 U.S. 83, 87 (1963). The District Court and the Court of Appeals both found that the government had violated these discovery rights in Marquez's case.

All of the reports referred to in Point I were discoverable and the failure of the government to turn them over to the defense prior to trial requires that the conviction be set aside.

POINT III

MARQUEZ WAS PREJUDICED BY THE CONSTITUTIONAL VIOLATIONS IN THIS CASE

The Court of Appeals found, 1) that Alvarez and Monserrate, the government's two principal witnesses at Marquez's trial had perjured themselves (138a) and 2) that the government had failed to disclose documents to which Marquez was entitled which would have revealed those perjuries for the jury (139a) Marquez submits that in addition the record in this case establishes that government agents, with knowledge tht those perjuries had been committed, failed to correct them; to the contrary, those agents falsified their own testimony in order to insure that those perjuries would go undetected.

Regardless of the culpability of the agents however, the

district court's findings of perjury and non-disclosure alone establish a serious violation of appellant's constitutional rights:

> [T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.
>
> Brady v. Maryland, 373 U.S. 83, 87, 83 (1963)

The government's case rested entirely on the uncorroborated and self-serving claims of Alvarez and Monserrate that they had been threatened during their meeting with Marquez. When the jury was deciding whether to believe them, however, it was unaware that in the course of

their testimony, these witnesses had perjured themselves repeatedly. The fact that the government now claims that it was unaware of those perjuries and that it was also unaware of the documents in its possession which would have exposed those perjuries, does not alleviate the prejudice that Marquez suffered, or the relief to which he is now entitled. In United States v. Seijo, 514 F.2d 1357, 1364 (2d Cir. 1975), the government likewise insisted that it was not aware of its witness's perjury or of the document in its files which would have exposed that perjury. Nevertheless, the Second Circuit ordered a new trial:

> ...when the reliability of a particular witness may be determinative of innocence or guilt, a "new trial is required if the false testimony could...in any reasonable likelihood have affected the judgment of the jury..."

The reliability of Alvarez and Monserrate was undisputably determinative of innocence or guilt in this case. Consequently, unless that false testimony was harmless, Marquez is entitled to a new trial even if the government had been unaware of its perjurious nature.

It is clear from the record in this case, however, that the agents were aware of the perjurious nature of that testimony, since Alvarez and Monserrate had confessed the past-posting scheme to them on December 10, 1969. The fact that the agents allowed that false testimony to go uncorrected and even took the stand to give further false testimony in support of it, serves to make the constitutional violations in this case even more offensive to the principles and the integrity of the criminal justice system:

> The principles governing this case are simple and well-settled. Knowing use by the State of perjured testimony deprives the defendant of due process, violating the Fourteenth Amendment and requiring a new trial. This is so whether the prosecutor makes the false statements himself or allows the false statements of a witness to go uncorrected. Giglio v. United States, 405 U.S. 150, 153, 92 S.Ct. 763, 765, 31 L.Ed.2d104 (1972); Napue v. Illinois, 360 U.S. 264,269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959); Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 341, 79 L.Ed. 791 (1935); Taylor v. Lombard, 606 F.2d 371, 375 (2d Cir. 1979), cert. denied, U.S. ,100 S.Ct. 1346, 63 L.Ed.2d 781 (1980); United States ex rel. Washington v. Vincent, 525 F.2d 262, 267 (2d Cir. 1975), cert. denied, 424 U.S. 934, 96 S.Ct. 1147, 47 L.Ed.2d 341 (1976).
>
> DuBose v. LeVevre, 619 F.2d 973, 978 (2d Cir. 1980)

Although acknowledging that Monserrate and Alvarez had perjured themselves at Marquez's trial, the opinions below sought to

characterize those perjuries as collateral and thereby to dismiss them, as well as the government's failure to disclose the documents which would have exposed them, as harmless. In doing so, the court failed to recognize both the materiality of those perjuries and the impact which their disclosure would have had on the jury.

The government's case rested entirely on the credibility of these two witnesses. Consequently, even if the subject matter of these perjuries had been merely collateral, the fact that these two witnesses had lied repeatedly while testifying under oath in this case would have been highly relevant to the jury's deliberations. The government's failure to correct those perjuries, or to disclose the documents which would have exposed them was therefore extremely

prejudicial. In United States v. Seijo, supra, the government's witness lied about a purely collateral matter - a prior marijuana conviction. Although the prosecutor was unaware of it, the government had in its files a document which would have exposed that perjury. The Second Circuit ruled that even though the perjury was on a purely collateral matter, the fact that the witness had lied under oath was highly relevant to the jury's evaluation of the credibility of his claims concerning the crimes charged. Since the government's case rested on the credibility of that witness, the conviction had to be set aside:

> The taint of Torres' false testimony is not erased because his untruthfulness affects only his credibility as a witness. "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence ...." Napue v.

> Illinois, supra, 360 U.S. at 269, 79 S.Ct. at 1177. It is so here; the jury was squarely faced with the hard question of whom to be lieve. See United States v. Badalamente, supra, 507 F.2d at 15.
>
> United States v. Seijo, supra, 514 F.2d at 1364.

Likewise, in DuBose v. LeFevre, supra, this Court refused to find that the stringent test for harmless error had been met, even though the perjury in that case was solely on a collateral matter, going only to the general credibility of one of the prosecution's witnesses:

> It makes no difference that the materially false testimony goes only to the credibility of a witness. Napue v. Illinois, supra, 360 U.S. at 269...; United States ex rel. Washington v. Vincent, supra, 525 F.2d at 267.
>
> DuBose v. LeFevre, supra, 619 F.2d at 978.

See also United States v. Sperling, 506 F.2d 1323 (2d Cir. 1974).

Here, of course, the impeaching effect of the perjuries which occurred was much more substantial, going not merely to the credibility of one witness, but of all of the government's principal witnesses at trial. Had the jury known that those witnesses, including several F.B.I. agents (frequently regarded by jurors as virtually unimpeachable), had perjured themselves, the jurors would have been much less likely to believe those witnesses or the government's case which depended on their testimony. DuBose v. LeFevre, supra, 619 F.2d at 978-79; United States ex rel. Washington v. Vincent, supra, 525 F.2d at 267-68; United States v. Seijo, 514 F.2d 1357, 1363-64 (2d Cir. 1975). The perjuries which occurred in this

case were far more pervasive and impeaching than the isolated perjuries in Seijo and DuBose. Consequently even if they had been merely collateral, the appellant in this case would be entitled to the same reliefas this Court granted to the appellants in those proceedings.

In fact, however, the perjuries which occurred in this case were not collateral. Rather, the past-posting scheme to which those perjuries related was highly relevant to the defense for two reasons. First, as previously explained, it was essential to Marquez' defense to convince the jury that Monserrate and Alvarez had swindled the money in question, and that Monserrate had therefore been willing to retrieve that money voluntarily, rather than as a result of extortionate threats. Secondly, if the defense could have

proven that Monserrate and Alvarez were swindlers, that evidence could have been used to impeach their credibility, since fraud is a credibility-impeaching offense. Rule 609, Federal Rules of Evidence; (Smith v. United States, 283 F.2d 16 (6th Cir. 1960) (larceny by trick is a crime affecting credibility); Christianson v. United States, 226 F.2d 646 (8th Cir. 1955) (embezzlement is a crime affecting credibility).

Defense counsel focused on these two themes throughout the trial proceedings. Thus, in his opening, defense counsel, apparently anticipating that they would be able to prove Monserrate's involvement in the past-posting scheme, argued:

> The evidence will show that Nieves Monserrate was nothing but a dishonest crook who, when caught in the thievery of his illegal activities, yelled cop to

> prevent himself from paying back what he stole, and hence these charges.
>
> (T9)

The government countered this argument by insisting that Monserrate denied any swindle. It even went further, attempting to curry sympathy with the jury by claiming (falsely as it turned out) that the money which Monserrate turned over to Marquez constituted "earnings from salary from legitimate jobs." (T5)

Even putting aside the second reason above (the fraud as credibility impeachment), the substantive and direct nature of the evidence of the past-posting scheme is clear.

The only plausible alternative to the government's theory of extortion was that Monserrate went to"recover" those monies for some other reason. The only such reason

was that Monserrate had been caught cheating and was given the opportunity of settling the matter at a bargain price (i.e. $7,300, far less than the amount actually stolen). In other words, the evidence of the swindle went directly to Monserrate's motive for going to Puerto Rico. It is not Marquez's position that the swindle itself would relieve him of culpability, rather it is that the swindle was strong evidence of an alternative, non-culpable explanation for Monserrate's trip to Puerto Rico. Evidence going to motive is not collateral. The jury had the right to know that Monserrate had cheated Marquez in order to decide if Marquez had threatened him or if Monserrate paid the debt without coercion. The evidence of the swindle was the heart of the defense, not as an attempt to label Monserrate as a cheater, but as

one proof of the real reason for Monserrate's trip.

So too, it must be remembered that the jury's job in this case thus came down to judging a "swearing match" between Monserrate and Alvrez, on the one hand, and Rivera on the other. The Second Circuit is, simply, not justified in finding that in that context, the F.B.I. reports, in the hands of skilled defense attorneys, would not have had any possible effect on the jury. Without the benefit of those documents, the jury was forced to conclude that Rivera was lying and that Monserrate and Alvarez were telling the truth. Had defense counsel had the benefit of those reports, however, they could have convinced the jury that on one disputed issue - the past-posting - Rivera was testifying truthfully,

while Alvarez[7] and Monserrate had perjured themselves, not once but repeatedly, both in their trial testimony to that jury and in several of their pre-trial statements to the prosecutor and the government investigators. Counsel could then have argued persuasively to the jury that since Rivera was testifying truthfully and Alvarez and Monserrate were perjuring themselves concerning the allegations of extortion. Contradicted by River's testimony, uncorroborated by any other evidence, and now impeached by their own prior statements, there is more than a "reasonable likelihood" that the

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(7) The defense could also have shown that Alvarez had no reason to lie about the cheating other than to bolster the government's case, for the suppressed documents showed that he had told the agents that Monserrate had, before trial, admitted the scheme to Marquez. See p. 39-41 supra.

testimony of Monserrate and Alvarez concerning the extortionate threats would have been found to constitute less than proof beyond a reasonable doubt in the mind of at least one juror.

Both the District Court and the Second Circuit iterate that the past-posting scheme was tangential. This position is simply wrong. No matter how many times this matter is called tangential, it cannot change the substantive and critical importance of it to the defense. Calling an elephant a bird will not help it to fly.

CONCLUSION

FOR THE REASONS STATED ABOVE, THE WRIT SHOULD BE GRANTED.

Respectfully submitted,

GOLDBERGER, FELDMAN,
DUBIN & WEISENFELD
401 Broadway
New York, New York 10013

Appendix

APPENDICES

APPENDIX A

MOTION FOR AN ORDER PURSUANT TO 28 U.S.C. §1651

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - -x

THE UNITED STATES OF AMERICA

- against -

RAYMOND MARQUEZ
- - - - - - - - - - - - -x

NOTICE OF MOTION FOR AN ORDER PURSUANT TO 28 U.S.C. §1651

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of Raymond Marquez, and upon the prior proceedings in United States v. Raymond Marquez, 70 Cr. 113 (S.D.N.Y.), the undersigned will move this Court at the United States Courthouse, Foley Square, New York, New York 10007 on February 6, 1981, at 9:30 a.m. or as

soon thereafter as counsel can be heard for an order pursuant to 28 U.S.C. §1651 vacating petitioner's conviction in United States v. Raymond Marquez, 70 Cr. 113 (S.D.N.Y.) on the ground that said conviction was obtained in violation of petitioner's rights under the United States Constitution and the laws of the United States.

Respectfully submitted,

GOLDBERG, FELDMAN,
DUBIN & YOUNG

By: _____
PAUL A. GOLDBERGER
Attorneys for
petitioner Marquez
401 Broadway
Suite 306
New York, N.Y. 10013
(212) 431-9380

To: Clerk, United States
District Court
Southern District of
New York

United States Attorney
Southern District of
New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - -x

THE UNITED STATES
OF AMERICA

AFFIDAVIT

- against -

RAYMOND MARQUEZ
- - - - - - - - - - - - - -x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

RAYMOND MARQUEZ, being duly sworn, deposes and says:

I am the petitioner in the above-captioned proceeding. I make this affidavit in support of a motion for a writ in the nature of a writ of error coram nobis, vacating my conviction in United States v. Raymond Marquez, 70 Cr. 113 (S.D.N.Y.). The factual allegations herein are based on personal knowledge, the proceedings

in the above-cited criminal case, and conversations I have had with my attorneys.

On February 17, 1970, I was charged along with two co-defendants in a three count indictment, arising out of allegations that we had extorted one Juan Nieves Monserrate by forcing him to travel from New York to Puerto Rico and return with gambling money he had earlier taken to Puerto Rico.

The government's main witnesses at trial were Monserrate and his father-in-law, Tomas Alvarez. According to their testimony, Monserrate had allegedly worked during 1969 in a numbers betting business making collections of the numbers which had been bet each day and bring-

ing those envelopes to a "bank".

On December 7, 1969, co-defendant Pedro Rivera allegedly went to Monserrate's apartment and told him that I wanted to see him. The following day, Monserrate and Alvarez, accomanied by Rivera, allegedly met with me and co-defendant Anthony Angelet. According to Monserrate and Alvarez, I accused them both of cheating the numbers operation by placing bets after two of the three digits of the winning number had already been determined. Upon learning from Monserrate that he had money in Puerto Rico, the other defendants and I allegedly ordered Monserrate to bring that money to New York.

The following day, Monserrate flew to Puerto Rico and on

December 10, 1979, he returned to New York with $7,300.

Monserrate was met at the airport by FBI agents, who told him that they knew of his encounter with the defendants and asked him to cooperate with them. When Monserrate agreed to do so, he was taken to FBi headquarters where the money was marked. The following morning, he returned to the FBI office and called Rivera to arrange to turn the money over to me.

Pursuant to instructions which he received at that time, Monserrate was driven by FBI agents to the Caribe Flower Shop where he turned the money over to me. A few minutes later, FBI agents entered the shop and arrested me.

Throughout his testimony, Monserrate insisted that he had not stolen any money from me. Later, co-defendant Rivera took the stand, testifying that Monserrate had cheated on the numbers and that no threats had been made to induce Monserrate to return the money he had swindled. Rivera also testified that Monserrate had not been told by any of the defendants that he had to go to Puerto Rico to get the money.

Based on this evidence, the jury convicted me of the crimes charged in the indictment. On February 2, 1971, I was sentenced to a term of imprisonment of three years on each of the three counts, the sentences to be run concurrently.

Following the affirmance of my conviction, I filed a motion for a

new trial based on newly discovered evidence, alleging inter alia that Monserrate had perjured himself when he insisted at my trial that he had not cheated the gambling operation. Following a hearing, the Court denied my motion. A copy of the Court's opinion is attached hereto as Exhibit A. Although the Court agreed that Monserrate had perjured himself on this issue at trial (Exhibit A at 8-9), it ruled that said perjury did not require a retrial in the absence of any evidence that the government knew of that perjury at the time of trial. In support of this finding, the Court expressly credited the hearing testimony of FBI agents and the Assistant United States Attorney that Monserrate "refused to admit that he

had cheated during 'interrogation' prior to the trial" (Exhibit A at 11), as well as Monserrate's own hearing testimony that "he had never told any law enforcement officials that he had cheated prior to a discussion with an FBI agent in later 1972 when interviewed in connection with the present motion." (Exhibit A at 11.) Based on this testimony, the Court concluded that "the government agents can hardly be accused of suppressing information which they did not possess." (Exhibit A at 9.)

Subsequent to my release from prison, I made application under the Freedom of Information Act for information concerning me in the government's possession. Pursuant to that application, I was recently pro-

vided with FBI reports concerning this case. Included among those reports was a report dated December 12, 1969 from the New York Office of the FBi to the Bureau director, describing the statements which Monserrate made to the agents immediately following his arrest. A copy of this report is attached hereto as Exhibit B. According to said report:

> Agents were successful in intercepting Nieves [Monserrate] at John F. Kennedy Airport upon his return from Puerto Rico the night of December 10 [1969]. After a penetrative interview, Nieves finally admitted his involvement in situation [deleted] and agreed to cooperate. He stated he had recovered seven thousand four hundred thirty five dollars of the money swindled from Marquez and had brought that amount with him. Facts of the case were discussed with Assistant United State Attorney Andrew Maloney, Southern District of New York.

Exhibit B at 3-4

This report establishes that my conviction was obtained in violation of my rights under both the Federal Constitution and the laws of the United States, in that"

1. the government violated my rights under the due process clause of the Federal Constitution by knowingly allowing Monserrate to perjure himself at my trial when he insisted that he had not cheated me;

2. the government violated my rights under the due process clause of the Federal Constitution by knowingly allowing Monserrate and other witnesses at the hearing on my motion for a new trial to perjure themselves by testifying that Monserrate never told any law enforcement officials that he

had cheated me until 1972; and

3. the government violated my rights under the due process clause of the Federal Constitution as intrepreted in Brady v. Maryland, 373 U.S. 83 (1963), 18 U.S.C. §3500 and Rule 16 of the Federal Rules of Criminal Procedure by failing to disclose the December 12, 1969 FBI report containing Monserrate's admissions to the defense before or during my trial.

WHEREFORE, it is respectfully prayed that this Court enter an order in the nature of a writ of error

coram nobis, vacating my conviction in United States v. Marquez, 70 Cr. 113 (S.D.N.Y.).

/s/ Raymond Marquez
RAYMOND MARQUEZ

Sworn to before me this
day of January, 1981

OPINION BELOW

EDWARD WEINFELD, D.J.

This motion for a new trial is predicated upon the alleged perjury of two government witnesses. The movant, Raymond Marquez, along with his two codefendants, was convicted on December 10, 1970, after a six-day trial on all three counts of an indictment charging them with causing Juan Nieves Monserrate to travel between New York City and Puerto Rico for the purpose of: (1) distributing the proceeds of an illegal gambling operation; (2) committing extortion; and (3) conspiring to commit both of these offenses.[1] The Court of

(1) 18 U.S.C. Sections 1952, 371.

EXHIBIT A

appeals affirmed the convictions[2] and an application for writ of certiorari was denied by the Supreme Court.[3] Marquez admitted that the government's two principal witnesses, Monserrate and Tomas Alvarez, perjured themselves as to testimony which "went to the heart and substance" of the government's case.[4]

In order to place the present motion in proper perspective, it will be useful to briefly outline the relevant testimony at trial. The essence of the government's charges was that Marquez, the "boss" or "banker" of the operation, caused

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(2) United States v. Marquez, 449 F. 2d 89 (2d Cir. 1971).

(3) Marquez v. United States, 405 U.S. 963 (1972).

(4) The two codefendants do not join Marquez in this motion.

Monserrate, by means of threats against him and his father-in-law Tomas Alvarez, to travel to Puerto Rico for the purpose of returning to Marquez funds of which he was alleged to have cheated the operation. The evidence established that on December 7, 1969, codefendant Rivera, who was a "controller" in the policy operation, told Monserrate, who was a "pickup" man or messenger, that something was wrong in his operation and that "Raymond" (Marquez) wanted to see him at the "bank", the headquarters of Marquez's policy operation. The next day River drove Monserrate and Alvarez to the "bank", a florist shop, where Monserrate was taken into a room of an adjoining premise and was met by petitioner, Marquez, and a codefendant,

Angelet. Marquez accused Monserrate of cheating the operation by placing bets for himself after two numbers had ben published. Monserrate denied the cheating, which Marquez computd at $14,000; when Monserrate said all the money he had was in Puerto Rico, at one point or another both Marquez and Angelet ordered him to go there immediately to return with the money; when Monserrate sought delay because his wife was in the hospital, Marquez and Angelet responded that was not their problem; that Monserrate knew with whom he was playing and better bring back the money for his own good. Other statements of a similar nature, clearly threats, were ade by Marquez and Angelet. Later, when Alvarez was brought into the room, he also was

accused of cheating by Marquez, and during this session threats of physical violence were made, and at one point Angelet upraised a long iron bar which he threatened to ram into Alvarez's chest. Marquez told Alveraz if he did not pay, his family would have to pay and that he could not escape. Monserratre testified he was scared and frightened that something might happen to his family. The next morning, December 9, Monserrate withdrew $1,000 from a bank and gave either $700 or $800 to Rivera, who testified he delivered the money to Marquez. Monserrate used the balance to purchase a round trip air passage ticket to Puerto Rico, to where he flew that day and retrieved $7,435 from his aunt, who had been holding it

for him. He flew back to New York the next day and upon deplaining at Kennedy Airport was met by FBI agents who told him they were aware of his problem with Marquez. He agreed to cooperate, told them what had occurred at the "bank", and turned over the $7,435 to the agents. The following morning, December 11, Monserrate, pursuant to the instructions and under surveillance of FBI agents, returned to the "bank", where he delivered the $7,435 to Marquez, whereupon he was arrested.

The instant motion for a new trial upon the claim of newly discovered evidence is made two years after the return of the jury verdict. The petitioner's newly retained attorneys, engaged after the affirmance of the

judgment of conviction, made arrangements with Pedro Lopez, an acquaintance of Monserrate, to engage in conversations with respect to his testimony at the trial. Lopez's conversations with Monserrate and one with Alvarez spanned the period from May to September 1972, and took place in the office of the attorneys, who actively participated in that discussion. On all occasions Lopez had on his person a concealed tape recorder. Statements made by Monserrate and Alvarez during these recordings, allegedly at variance with their trial testimony, are the basis of the present motion, as to which an evidentiary hearing was conducted. The petitioner contends that Monserrate, the principal witness, testified falsely at the trial that

(1) Marquez ordered him to go to Puerto Rico to return with the money he said he had there; (2) that upon his arrival at Kennedy Airport he turned over to FBI agents the money he had brought here from Puerto Rico; and (3) that he did not cheat the gambling operation. Marquez also alleges that Alvarez testified falsely at the trial with respect to his role in the cheating.

In addition to the opportunity to observe the witnesses who testified at the evidentiary hearing, the Court has read a translation of the transcriptions of the recordings submitted by petitioner's counsel, since the conversations except the one at the attorney's office were mostly in Spanish. While the tapes, unclear in

many spots, contain statements which could be viewed as at variance with Monserrate's trial testimony as to the three specifications of alleged perjury noted above, it is unnecessary to consider the first two because this Court is convinced beyond a reasonable doubt, based upon the evidence presented at the hearing, the demeanor of the witnesses thereat and the trial record, that Monserrate's trial testimony as to these matters was truthful. We shall presently consider Monserrate's acknowledgement at the hearing, that contrary to his trial testimony, he did cheat the gambling operation, which he insisted was the only matter as to which he gave false testimony at the trial. As to the other two ites, Monserrate adhered to

the substance of his trial testimony that Marquez ordered him to go to Puerto Rico to get the money and made the threats, direct and implied; also, that upon his return he surrendered the $7,435 to the FBI agents at the airport. Monserrate's trial and hearing version of his surrender of the money to the FBI was fully corroborated by the trial and hearing testimony of FBI agents and by the written receipt for the money given an FBI agent.[5]

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(5) Petitioner relied upon Monserrate's statement during one of the tape recordings, when led on by Lopez's suggestive question, that upon arrival at Kennedy Airport he was met by some of Marquez's men and turned the money over to them and not to the FBI. If this were the fact, there is no explanation for petitioner's failure to produce at the hearing his men who allegedly received the money.

Alvarez's trial and hearing testimony also lend support to Monserrate's trial and hearing account of Marquez's order that he go to Puerto Rico to obtain the money. And while it may be argued that Alvarez's testimony is suspect, strong corroboration is found in the circumstances that the morning following the "kangaroo court", presided over by Marquez and Angelet, Monserrate withdrew $1,000 from his bank account, using part of the proceeds for his airplane tickets; that he left that very day for Puerto Rico and returned the next day; further, that Alvarez, too, the morning following these events, gave Rivera, who came to his home, his entire savings, $1,000, because he was afraid. But entirely apart from

affirmative evidence supporting Monserrate's trial testimony on the foregoing two items, there are factors which seriouly undermine those portions of the taped conversations which petitioner relies upon to support his charges. First, Monserrate's taped recorded statements are by no means a "model of clarity"; indeed, they are not only unclear, but abound with contradictions of the very statements upon which petitioner relies; there are points at which Monserrate confirms that Marquez did direct him to get the money from Puerto Rico accom-

panied by threats,[6] and that he did surrender the money to the FBI at Kennedy Airport.[7] Secondly, the questioning by Lopez, and on the one occasion by Marquez's attorneys was continually leading, suggestive and left no doubt as to the answers that were desired, which in a number of instances parroted the questions. Monserrate was clearly under considerable pressure and "harassed" throughout these conversations. At several points Lopez accused Monserrate of squealing on Marquez and testifying

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(6) See, e.q., p. 13 of 8/22/72 tape transcript: "And then Raymond Marquez and Angelletto and a few more Italian guys they made me go to Puerto Rico and get the money and they tell me if I don't go to Puerto Rico and get that money they are going to kill family". See also p.24.

(7) See pp. 17-18 of 8/2/72 tape transcript.

against him for money.[8] It is not surprising that under these circumstances he lied to Marquez's lawyers and Lopez in order, as he put it at the hearing, "to get them off my back" because "all I wanted was to be left along".[9] Moreover, both Monserrate and Lopez testified at the hearing that the former consumed substantial quantities of liquor during the course of each of the recorded conversations.[10] Monserrate stated that he was drunk when he left the lawyer's offices and one of the lawyers admitted hard liquor was consumed by Monserrate. but denied he was drunk while there; and an earlier recorded

(8) See pp. 21-24 of 8/17/72 tape transcript.
(9) Hearing minutes, 91-92.
(10) Id. at 15-17, 74-76.

conversation with Lopez contains a declaration by Monserrate that he was drunk.[1] Based upon a consideration of all factors, the Court finds that Monserrate's testimony at trial as to (1) Marquez's order, accompanied by threats, to go to Puerto Rico and return with the money, and (2) his meeting at Kennedy Airport with the FBI was truthful and not in any was perjured.

We now turn to the third item, Monserrate's and Alvarez's trial testimony that they did not cheat Marquez's gambling operation. Monserrate admitted at the evidentiary hearing, as the tape recordings reflect, that his trial testimony on this subject was false. His explana-

(1) 18 U.S.C. Sections 1952, 371.

tion was that he felt he was in jeopardy; that there had been talk of putting bullets through people; and he was afraid of both Marquez and Angelet; further, that at the tie of trial a relative, whom he regarded as his mother, was dying; his wife was at the hospital and with the troubles in the case he "wouldn't have cared if I had died."[12] Whatever his explanation, which of course does not excuse perjury, the question remains whether the denial of the cheating at the trial constitutes sufficient grounds to warrant a new trial.

Preliminarily, we consider the appropriate standard under which this claim is to be reviewed. The general standard governing motions for

(12) Hearing minutes, 87.

a new trial on the ground of newly discovered evidence is that the evidence must have been discovered after trial, must be matorial to the factual issues at the trial and not merely cumulative or impeaching, and of such a character that it would probably produce a different verdict in the event of retrial.[13] A mere liberal standard applies, however, in some instances, where the newly discovered evidence establishes that testimony introduced against a defendant was perjured. "Where the conviction is shown to be based even in part upon perjured testimony ... a court will

(13) See United States v. Kahn, 472 F. 2d 272, 287 (2d Cir. 1973); United States v. DeSapio, 456 F. 2d 644, 647 (2d Cir. 1972); United States v. Polisi, 416 F. 2d 573, 576-77 (2d Cir. 1969).

not stop to inquire as to the precise effect of the perjury, but will order a new trial if without the perjury the jury might not have convicted."[14] Recently, however, the Court of Appeals has suggested that this more liberal test should be restricted to instances of perjury which involve prosecutorial misconduct.[15] The movant contends that the government knew that Monserrate cheated and permitted him to give perjured testimony, but this allegation is without the slightest evidential support. At the hearing the FBI agents and the Assis-

(14) United States v. Polisi, 416 F. 2d 573, 577 (2d Cir. 1969). This is the rule articulated in Larrison v. United States, 24 F. 2d 82, 87 (7th Cir. 1928).

(15) United States v. DeSapio, 435 F. 2d 272, 286 n. 14 (1970), cert. denied, 402 U.S. 999 (1971).

tant United States Attorney involved in the case testified that Monserrate refused to admit that he had cheated during "interrogations" prior to the trial. Indeed, at the hearing he acknowledged that he had never told any law enforcement officials that he had cheated prior to a discussion with an FBI agent in late 1972 when interviewed in connection with the present motion.[16] The government agents can hardly be accused of suppressing information which they did not posses. There is no basis for suggesting, as movant does, that the FBI and the United States Attorney had an obligation to pursue the question of

(16) Alvarez also testified at the hearing that he never admitted cheating to law enforcement officials.

whether Monserrate had in fact cheated and should not have accepted his denials at face value. The issue was totally unrealted to the guilt or innocence of the defendants and was, as the FBI agents notes, "insignificant"[17] and "not really relevant"[18] to the investigation they were conducting.

In the absence of prosecutorial misconduct, the ultimate question to be decided is whether, had Monserrate testified at the trial that he cheated, it would probably have produced a different verdict. At the outset it is noted that the subject of cheating was exaggerated far out of proportion to its significance as to

(17) Hearing minutes, 156-57.
(18) Id. at 164-65.

the essential elements of the crimes charged, and while proper on the issue of credibility, was patently an attempt to becloud the issue. Whether or not Monserrate or his father-in-law chated Marquez's policy operation was not an element of the crimes charges against him or directly related to his guilt or innocence.[19] To put the matter in proper focus, the Court instructed the jury:

> "There has been much evidence and discussion as to whether Nieves cheated - a charge he denies. Even if you should find, as the defendants contend, that Nieves Monserrate cheated through a fix of numbers on the policy operation, this does not justify extortionate means to obtain the return of the money by wrongful

(19) Cf. United States v. Munchak, 338 F. Supp. 1283, 1292-93 (S.D.N.Y.), aff'd. 460 F. 2d 1407 (2d Cir.), cert. denied, 409 U.S. 915 (1972).

threats and the inducement of fear. The alleged wrongful acquisition of the proceds by Monserrate is not a defense against the crime of extortion. Accordingly, should you find that Nieves Monserrate cheated as claimed, and further find that the defendants intended to obtain the return or all or part of the money by installing fear that either he or a member of his family would be injured, and if the other elements of the offense

under counts 2 and 3 are met beyond a reasonable doubt, you have sufficient upon which to convict."[20]

Movant, however, argues that had Monserrate admitted upon the trial that he had cheated the gambling operation, it would have affected the jury's deliberation in two respects. First, that since he had transported the proceeds of his betting activities to Puerto Rico, the jury might have believed that he, Monserrate, either

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(20) Trial minutes of Dec. 18, 1970, pp. 39-40.

individually or as part of the conspiracy, had violated the law and was testifying favorably for the government in order to avoid prosecution, and that this would have cast doubt upon the substance ofhis testimony as to what happened at the flower shop. The suggestion that Monserrate was himself the likely subject of prosecution is, to understate it, rather farfetched. The FBI agents had information that Monserrate had gone to Puerto Rico because of his "trouble" with Marquez and told him they were there to protect him. To argue that a prosecution was intended against the alleged victim of the extortion carries its own refutation. Moreover, it was entirely clear from the FBI agents' and Monserrate's trial testi-

mony that he did in fact cooperate with them from his arrival at Kennedy Airport until the arrest of Marquez the following day, and the jury was free to surmise, as defense counsel argued, that he must have had reasons for so doing. Indeed, to the extent that movant claims that he was deprived of the opportunity to argue effectively to the jury that Monserrate was cooperating with the government in order to protect himself from possible charges of wrongdoing, it must be pointed out that the inference was available regardless of whether he had cheated, because the interstate transportation of the proceeds of a gambling operation with intent to distribute is a crime whether they are honestly or dishon-

estly acquired.[21]

Movant's second theory is that if Monserrate had admitted cheating, the jury would have more readily accepted the defendant's contention that Monserrate voluntarily decided, as a matter of conscience, to travel to Puerto Rico to return the money which he had stolen from the operation. The movant suggests it is easier to believe that a man voluntarily returned what he had stolen from another when he admits his theft than to believe that a man would voluntarily give up his own money to which those demanding it had no justifiable claim but this theory cuts both ways. If Monserrate had admitted that in fact he cheated the operation, the

(21) See 18 U.S.C. Section 1952.

jury might have more readily believed that Marquez was sufficiently angered to make the threats to which Monserrate and Alvarez testified. In addition, considering "the kangaroo court" conducted by Marquez in association with Angelet, the threats of violence thereat, the testimony of Rivera, the third defendant, that Monserrate did admit the cheating, and the totality of the trial record, the jury may well have viewed Monserrate's denial of cheating with kepticism. And the jury may well have accepted the defendant's contention which was so forcefully presented, that Monserrate had cheated, but nonetheless was satisfied that the government had sustained its burden as to the essential elements of the crimes

charged. Most importantly, however, the question of cheating was tangential to the principal issues; it went principally to credibility; it did not touch upon the essential elements of the crime. Futhermore, the thesis that Monserrate, after having cheated the operation of thousands of dollars, would voluntarily, in the absence of any threats, travel to and from Puerto Rico in a fast and hurried trip in order to obtain and return the proceeds of his theft approaches the incredible. Against the background of the trial as it unfolded from day to day, witness to witness, the totality of the trial evidence and the record of this proceeding, this Court is satisfied to a moral certainty that had Monserrate and his father-in-law

acknowledged upon the trial they had cheated the policy operation, it would not have, whichever test is applied, whether Berry v. State,[22] or Barrison v. United States,[23] changed the outcome of the trial - in sum, that it would not have raised a reasonable doubt in the mind of a single juror.[24]

There is also an entirely independent ground which requires the denial of this motion. It is well established that a motion for a new trial must be denied if the evidence, with due diligence, could have been discovered during the course of the

(22) 10 Ga. 511, 527 (1851).
(23) 24 F. 2d 82, 87 (7th Cir. 1928).
(24) Cf. United States v. Munchak, 338 F. Supp. 1283, 1292-93 (S.D.N.Y.), aff'd, 460 F. 2d 1407 (2d Cir.), cert. denied, 409 U.S. 915 (1972).

trial[25] or the pendency of the appeal.[26] The record clearly establishes, however, that Pedro Lopez, the individual who approached Monserrate, was known to petitioner prior to the occurrence of events at the "banl" in December 1969 and available to Marquez's counsel prior to the disposition of the appeal in the summer of 1971. At the hearing Lopez testified that he was contacted by both

(25) See, e.q., United States v. Edwards, 366 F. 2d 853, 873-74 (2d Cir. 1966), cert. denied, 386 U.S. 908 (1967); Brown v. United States v. Munchak, 338 F. Supp. 1283, 1293-94 (S.D.N.Y.), aff'd, 460 F. 2d 1407 (2d Cir.), cert. denied, 409 U.S. 915 (1972).

(26) See United States v. Rao, 318 F. Supp. 416, 420 (S.D.N.Y. 1970); United States v. Hoffa, 247 F. SUpp. 692, 701 (E.D. Tenn. 1965), aff'd, 382 F. 2d 856 (6th Cir. 1967), cert. denied, 390 U.S. 924 (1968).

Marquez's present and trial counsel cometime prior to the summer of 1971 concerning the possibility of his assisting Marquez. Given the availability of Lopez, no explanation has been offered or is readily apparent as to why the evidence upon which the present motion is based was not secured for over a year thereafter. Under these circumstances, it cannot be said that the requirement of due diligence has been met.

The motion for a new trial is denied.

Dated: New York, New York
August 2, 1973

s/Edward Weinfeld
United States
District Judge

NR 001 NY PLAINTEXT

227 AM URGENT 12-12-69 DMW

TO DIRECTOR

FROM NEW YORK (166-2685) 8P

RAYMOND MARWUEZ; ANTHONY ANGELET; PETER RIVERA also known as PETE RUSSO-FUGITIVE, ANIBAL CARRION, also known as "BIG AL"-FUGITIVE, Interstate Transportation in Aid of Racketeering-GAMBLING; Interstate Transportation in Aid of Racketeering-EXTORTION, Office of Origin, New York.

RENYAIRTEL TO BUREAU, TEN THIRTYONE SIXTY NINE.

END PAGE ONE

AGENTS WERE SUCCESSFUL IN INTERCEPTING NIEVES AT JOHN F. KENNEDY AIRPORT UPON HIS RETURN FROM PUERTO RICO THE NIGHT OF DECEMBER TEN. AFTER A PENETRATIVE INTERVIEW, NIEVES FINALLY ADMITTED HIS INVOLVEMENT IN SITUATION AND RELUCTANTLY AGREED TO COOPERATE. HE STATED

HE HAD RECOVERED SEVEN THOUSAND FOUR HUNDRED THIRTY FIVE DOLLARS OF THE MONEY SWINDLED FROM MARQUEZ AND HAD BROUGHT THAT AMOUNT WITH HIM. FACTS OF CASE WERE DISCUSSED WITH ASSISTANT UNITED STATES ATTORNEY [END PAGE THREE] ANDREW MALONEY, SOUTHERN DISTRICT OF NEW YORK. MALONEY AGREED THAT VIOLATION OF INTERSTATE TRANSPORTATION IN AID OF RACKETEERING DASH EXTORTION AND CONSPIRACY VIOLATIONS EXISTED. HE STATED PROSECUTION WOULD BE STRENGTHENED IF ARRESTS WERE MADE AFTER PAYOFF MADE BY NIEVES TO MARQUEZ. HE AUTHORIZED THE ARREST OF MARQUEZ, ANGELET AND RIVERA AND ANY OTHER PERSON KNOWN TO HANDLE THE MONEY AFTER PAYOFF. MALONEY FELT THAT ACTUAL FUNDS AS RETURNED FROM PUERTO RICO BY NIEVES IN FULL AMOUNT WITH NO SUBSTITUTION OR LESSER AMOUNT, SHOULD BE USED AND COMMISSIONER'S WARRANTS WERES WTAINED DECEMBER ELEVEN.

THE SITE OF THE PAYOFF IS LOCATED ON

EIGHTH AVENUE BETWEEN ONE ONE TWO AND ONE ONE THREE STREETS, HARLEM, NEW YORK. THIS IS ON HEAVILY TRAVELLED STREET IN AREA INHABITED BY NEGROES AND PEOPLE OF PUERTO RICAN ORIGIN. NEW YORK OFFICE HAS CONDUCTED SURVEILLANCES ON NUMEROUS OCCASIONS IN THIS AREA AND HAS EXECUTED SEARCH WARRANTS ON THE PAYOFF PREMISES ON TWO OCCASIONS IN THE RECENT PAST. BOTH OF THESE SEARCHES WERE HIGHLY [END PAGE FOUR] PRODUCTIVE. PAST EXPERIENCE HAS DISCLOSED THAT BECAUSE OF THE NEIGHBORHOOD, AGENTS OF EUROPEAN ORIGIN ARE QUICKLY DETECTED WHICH RESULTS IN ALERTING GAMBLING FIGURES IN THE AREA. IN ORDER TO PREVENT THIS UNDESIRABLE SITUATION DURING THE PAYOFF, THREE AGENTS OF LATIN AMERICAN ETHNIC BACKGROUND WERE USED AS STREET SURVEILLANCE AGENTS. ALL CARS AND THEIR AGENT OCCUPANTS WERE RESTRICTED TO AN AREA NO CLOSER THAN FOUR BLOCKS FROM THE SCENE. TWO OF THE THREE AGENTS CONCERNED WERE EQUIPPED WITH POCKET TRANS-

CEIVERS WITHOUT THE EAR PIECE RECEIVING DEVICES, SINCE EXPERIENCE HAS ALSO SHOWN THAT IN THIS EXTREMELY POLICE CONSCIOUS NEIGHBORHOOD THIS EAR DEVICE IS CAUSE FOR SUSPICION. THIS, OF COURSE, MEANT THAT THESE AGENTS COULD TRANSMIT MESSAGES BUT COULD NOT RECEIVE AND THIS PROCEDURE WAS CONSIDERED ESSENTIAL TO ASSURE A DISCREET COVERAGE OF THE SITE.

PLANS WERE MADE WITH NIEVES THAT HE WAS TO ENTER THE PREMISES, TURN OVER THE ONEY TO MARQUEZ, IMMEDIATELY LEAVE AND SN AT E TRANSACTION HAD BEEN CONSUMMATED, AT WHICH TIME THE STREET AGENTS WOULD NOTIFY CARS WHICH WOULD CLOSE IN AND [END PAGE FIVE] ARRESTS WOULD BE MADE. IF HE DID NOT EMERGE WITHIN FIVE MINUTES, AGNTS WOULD ENTER PREMISES TO INSURE NIEVES' SAFETY. SAC BAKER WAS IN VICINITY TO COORDINATE ARRESTS.

NIEVES OBSERVED BY STREET AGENTS, ENTERED PREMISES AS PLANNED. WITHIN A

FEW MOMENTS, AN INDIVIDUAL UNKNOWN TO STREET AGENTS EXITED, SUBSEQUENTLY ENTERED CAR AT CURB AND DEPARTED. FIVE MINUTES AFTER NIEVES HAD ENTERED PREMISES SINCE HE HAD NOT EMERGED, INSTRUCTIONS WERE GIVEN TO CLOSE IN AND MAKE ARRESTS. NIEVES WAS LOCATED WITH MARQUEZ WHO WAS IMMEDIATELY PLACED UNDER ARREST. THREE OTHER INDIVIDUALS NOT THE SUBJECT OF ARREST WARRANTS, WERE ALSO ON PREMISES. THE MONEY GIVEN BY NIEVES TO MARQUEZ WAS NOT LOCATED ON THE PERSONNEL OF PREMISES AND NIEVES PRIVATELY ADVISED THAT UPON TURNING THE MONEY OVER TO MARQUEZ, THE LATTER HAD HANDED IT TO THE INDIVIDUAL WHO THEN EXITED THE PREMISES. THIS INDIVIDUAL HAS BEEN IDENTIFIED AS ANIBAL CARRION, AND AN INTENSIVE INVESTIGATION IS BEING CONDUCTED ON AN AROUND THE CLOCK BASIS TO LOCATE HIM. [END PAGE SIX]

A THOROUGH EXAMINATION OF THE FACTS IN THIS MATTER HAS BEEN MADE, WHICH HAS

DISCLOSED THE FOLLOWING-

THE CARS MANNED BY AGENTS AS NOTED EARLIER, WERE POSITIONED NO CLOSER THAN FOUR BLOCKS FROM THE PAYOFF SITE. THIS WAS ESSENTIAL TO PREVENT THE LOOKOUTS WHICH THE MARQUEZ OPERATION EMPLOYS FROM ALERTING MARQUEZ OF THEIR PRESENCE. THIS ALSO MEANT THE CARS COULD NOT BE WITHIN VISUAL SIGHT OF THE PAYOFF LOCATION. IT WAS, THEREFORE, NECESSARY TO RELY UPON THE VISUAL OBSERVATION OF THE THREE STREET AGENTS WHO WERE ESPECIALLY SELECTED BECAUSE OF THEIR PHYSICAL APPEARANCE AND ABILITY TO MORE READILY BLEND INTO THE NEIGHBORHOOD. THESE AGENTS ARE EXPERIENCED AND COMPETENT INVESTIGATORS. THEY POSITIONED THEMSELVES ACROSS THE STREET FROM THE PAYOFF SITE AND MINGLED WITH THE LOCAL RESIDENTS ON THE STREET. TWO WERE TOGETHER A HALF BLOCK FROM THE THIRD. THE TWO AGENTS EQUIPPED WITH THE TRANSCEIVERS HAVE ADVISED THAT AFTER THE ENTRY

OF [END PAGE SEVEN] NIEVES, WHEN THEY SAW THE UNIDENTIFIED INDIVIDUAL (ANIBAL CARRION) EXIT, EACH CRYPTICALLY TRANSMITTED THIS INFORMATION OVER HIS POCKET TRANSCRIVER. SINCE THESE TWO WERE A HALF BLOCK APART, THEY WERE UNAWARE OF EACH OTHER'S ACTIONS IN THIS REGARD.

RECONSTRUCTION OF THE SEQUENCE OF EVENTS MAKES IT APPEAR THAT BOTH AGENTS TRANSMITTED SIMULTANEOUSLY RESULTING IN THEIR MESSAGES, WHICH WERE NECESSARILY SHORT, OVERRIDING EACH OTHER. AGENTS IN THE CARS ADVISE THAT AN UNINTELLIGIBLE, GARBLED TRANSMISSION WAS HEARD AND SINCE THE STREET AGENTS WERE NOT WEARING EAR PIECE RECEIVERS, THERE WAS NO WAY OF NITIFYING THEM THAT THEY HAD NOT BEEN UNDERSTOOD. THE BUREAU WILL BE KEPT ADVISED OF THE RESULTS OF INVESTIGATION TO LOCATE CARRION.

IN VIEW OF THE CIRCUMSTANCES AS OUTLINED ABOVE, IT IS FELD THAT NO ADMINIS-

TRATIVE ATION AGAINST THE PERONS INVOLVED
IS WARRANTED AND NONE IS RECOMMENDED.
END

KMC FBI WAS DC

APPENDIX B

SUPPLEMENTAL AFFIRMATION IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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THE UNITED STATES OF AMERICA,	SUPPLEMENTAL AFFIRMATION IN SUPPORT OF MOTION FOR AN ORDER PURSUANT TO 28 U.S.C. §1651
-against-	
RAYMOND MARQUEZ,	
Defendant-Petitioner	70 Cr. 113 (E.W.)

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MICHAEL YOUNG, an attorney admitted to practice in the United States District Court for the Southern District of New York, affirms the following:

I am an attorney for Raymond Marquez, the defendant-petitioner in the above-captioned proceeding. I make this supplemental affirmation in support of a previously filed motion by Mr. Marquez for an order pursuant to 28 U.S.C. §1651 vacating his conviction in United States v. Raymond Marquez, 70 Cr. 113 (S.D.N.Y.). The factual allegations herein are based on personal knowledge and the prior proceedings herein.

On or about January 20, 1981, Mr. Marquez filed a motion with this court asking that his conviction be set aside on the ground that a redacted F.B.I. report, (hereinafter the "Airtel") recently disclosed to him under the Freedom of Information

Act established 1) that the government had violated his constitutional and statutory discovery rights by failing to turn this document over to him at the time of this trial, 2) that the government had knowingly used perjury testimony by one Juan Nieves Monserrate at his trial and at the post-trial hearing on his motion for a new trial, and 3) that government agents had given false testimony at Marquez's trial and the hearing on his new trial motion concerning their interview with Monserrate.

In responding to this application, the government produced a second F.B.I. report, dated 12/10/69, which likewise had not been turned over to the defense at the time of

trial. This second report established that the government had also made knowing use of perjury by one Thomas Alvarez at Marquez's trial and the hearing on the new trial motion and that the agents had given false testimony at the hearing concerning their interview with Alvarez.

The court held oral argument on the motion on July 9, 1981. The following day, I phoned Assistant United States Attorney Feldberg and asked him for an unredacted copy of the "Airtel." Thirteen days later, on July 22, 1981, Mr. Feldberg provided me with a letter describing the redacted portions of that document. That letter is attached hereto as exhibit A.

As with the 12/10/69 report attached to the government's papers, this letter serves further to establish defendant's entitlement to the relief he has requested. According to Mr. Feldberg, the first two and one-half pages of the Airtel consist of a description of agents' interview with Thomas Alvarez on December 10, 1969, at which Alvarez admitted that he and Monserrate had swindled Marquez by "past-posting" betting slips. (see Feldberg letter of 7/21/81 at 1-2). As such, this portion of the Airtel corroborates the 12/10/69 F.B.I. report previously made part of this proceeding, and confirms that the government made knowing use of perjury both when it allowed

Alvarez to testify that he had not been involved in past-posting and when it allowed the agents to testify that Alvarez had not admitted past-posting to them at that interview.

More importantly, the redacted portions of the Airtel confirm what defendant argued, and the government contested, in their original papers on this motion concerning Monserrate - that he also admitted the past-posting swindle during his initial interview with Federal agents. Specifically, after recounting Alvarez's description of the past-posting swindle, the report, at page three, proceeds to describe the agents' interview with Monserrate on December 10th. Unredacted, that

portion of the report now reads:

> Agents were successful in intercepting Nieves at John F. Kennedy Airport upon his return from Puerto Rico the night of December ten. After a penetrative interview, Nieves finally admitted his involvement in situation as outlined by Alvarez[1] and reluctantly agreed to cooperate. He stated he had recovered seven thousand four hundred thirty five dollars of the money swindled from Marquez and had brought that amount with him.

Since the past-posting swindle was the central element of the "situation as outlined by Alvarez," the statement in the report that Monserrate "admitted his involvement in the situation as outlined by Alvarez," coupled with the

(1) This portion of the report was redacted from the copy originally provided to defendant.

following sentence, which reports that Monserrate "stated he had recovered" the money "swindled from Marquez..." clearly indicates that Monserrate admitted the past-posting swindle to the agents during that interview. Consequently, the unredacted Airtel establishes that the government made knowing use of perjury by both Monserrate and Alvarez, as well as several agents, at defendant's trial and post-trial hearing.

It is also now clear that the redacted portions of the Airtel, like the other portions of that report and the 12/10/69 report, would have provided powerful impeachment materials, going directly to the heart of the defense version of the case,

had they been turned over to the defense as required by law at the time of defendant's trial. The government's failure to disclose these documents at trial is alone sufficient to mandate the relief defendant seeks. See e.g. United States v. Seijo 514 F.2d 1357, 1363 (2d Cir. 1975).

WHEREFORE, it is respectfully prayed that this Court enter an order vacating the judgment of conviction in United States v. Marquez, 70 Cr. 113 (S.D.N.Y.) and granting such other relief as the court deems just and proper.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
July 22, 1981

/s/ Michael Young
MICHAEL YOUNG

(SEAL) U.S. DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK

One St. Andrews Plaza
New York, New York 10007

July 21, 1981

Michael Young, Esq.
Goldberger, Feldman, Dubin & Young
401 Broadway - Suite 306
New York, N.Y. 10013

Re. United States v. Raymond Marquez
70 Cr. 113 (EW)

Dear Mr. Young:

I am writing to set forth the portions of the document annexed as Exhibit B to defendant's moving papers in this case which were blocked out.

The blocked out portion of page one states:

"New York Two Hundred Dash C on December Nine, Sixty-Nine, advised that two Puerto Rican individuals known as 'Papo' and his father in law, had past-posted numbers several times

EXHIBIT A

recently on subject, Raymond Marquez. Informant stated these individuals had been caught at this past-posting and subsequently threatened by subject Angelet in the presence of Marquez.

"Tomas Alvarez, one six six two Park Avenue, New York City, was identified as 'Papo's' father in law and was interviewed at the New York Office December ten, sixty-nine. Alvarez advised his son in law, Juan Nieves Monsserrat, also known as 'Papo', had gotten him to asist in past-posting several numbers ..."

Page two provides in full:

"... in the Spanish Raymond numbers operation. This had occurred once a week for the past three weeks and resulted in his swindling more than two thousand dollars from the

Marquez operation. Nieves had swindled a great deal more. On approximately December four, sixty-nine, he past-posted some additional numbers but was then advised by his controller, Peter Rivera that these hits would not be paid. On December eight, sixty-nine, Rivera, accompanied by Angel Luis, an associate of Rivera, picked up Alvarez and went to Nieves' home. Rivera advised them they had to go the the 'numbers office' to get the matter of these hits straightened out. Alvarez said when they arrived at the office, located in an apartment, Marquez was there with an individual whom Alvarez later identified as Anthony Angelet.

"Angelet, in English, cursed and threatened bodily harm to

Alvarez. Angelet pushed him twice and told him he was responsible for this past-posting and then picked up a steel. . ."

The blocked out portion at the top of page three provides:

" . . . door brace and threatened him with it. Alvarez said Angelet also had a revolver tucked inside his belt. Alvarez was advised he had to come up with twenty three hundred dollars or else. Nieves was apparently told separately how much money he had to repay. Alvarez said on December nine he paid Revera one thousand of the twenty three hundred dollars he owed.

"Alvarez said Nieves left on December nine for Puerto Rico in order to obtain the money to pay Marquez and

Angelet, which money he had sent down with his brother."

The blocked out portion toward the end of page three provides:

". . . as outlined by Alvarez . . ."

Very Truly Yours,

JOHN S. MARTIN, JR.
United States Attorney

By: _____
MICHAEL S. FELDBERG
Assistant United
States Attorney
Telephone:
(212) 791-1934

APPENDIX C

AFFIDAVIT OF ASSISTANT UNITED STATES ATTORNEY FELDBERG OF MARCH 26, 1981

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - -x

UNITED STATES OF AMERICA — AFFIDAVIT

- v - — 70 Cr. 113 (EW)

RAYMOND MARQUEZ,

Defendant.
- - - - - - - - - - - - - -x

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.
SOUTHERN DISTRICT OF NEW YORK)

MICHAEL S. FELDBERG, being duly sworn, deposes and says:

I am an Assistant United States Attorney for the Southern District of New York, and I am familiar with the facts and circumstances set forth herein.

I have reviewed files in the possession, custody and control of the

Government concerning petitioner's motion for a writ of error coram nobis. Those files include the December 12, 1969 document on which petitioner's motion is based. I am informed by officials of the Federal Bureau of Investigation that the December 12, 1969 document is a telex prepared by the Special Agent in charge of the New York Office of the FBI, based upon information in files available to him.

Those files include a Memorandum which reveals that both an informant, and Tomas Alvarex, the father-in-law of Juan Nieves Monserrate ("Monserrate"), told FBI agents that Monserrate had cheated the gambling business operated by petitioner. In particular, the Memorandum

reveals that in an interview on December 10, 1969, Alvarez so informed the FBI. A copy of that Memorandum is annexed hereto as Exhibit A.

That is the only document in the files which I have reviewed which could be the source of the reference to "swindled" funds in the December 12, 1969 telex prepared by the Special Agent in charge. There is no indication in those files that Monserrate himself, at any time prior to or during trial, acknowledged that he had cheated petitioner's business. Specifically, there is no indication that Monserrate acknowledged, during his meeting with Goverment agents on December 12, 1969, that he had so cheated.

On the contrary, the files indicate that prior to and during

trial, Monserrate consistently denied that he had cheated petitioner. Annexed hereto as Exhibit B, for example, is a copy of the translation of a statement given by Monserrate to FBI agents on December 15, 1969, in which Monserrate denied that he had cheated petitioner. That statement is typical of those given by Monserrte prior to and during trial, and there is no indication that the Government knew that Monserrate's testimony was false.

/s/ Michael S. Feldberg
MICHAEL S. FELDBERG

Sworn to before me this
26th day of March, 1981.

/s/ Pearl Zwirn

[Notary Public Stamp]

UNITED STATES GOVERNMENT

M E M O R A N D U M

TO: SAC (166-NEW) DATE: 12/10/69

FROM: SA WILLIAM J. CANALEZ #55

SUBJECT: RAYMOND MARQUEZ;
ANTHONY ANGELET;
PETER RIVERA aka
Pete Russo;
ANGEL LUIS COLON
ITAR-GAMBLING;
ITAR-EXTORTION
(OO:NY)

Based on information furnished by NY 200-C which indicated that two Puerto Rican individuals known to the informant as "Papo" and his father-in-law, had past-posted several times in the "Spanish" RAYMOND numbers operation and had been caught at it and subsequently threatened by ANGELET in the presence of MARQUEZ, the following investigation was conducted:

On 12/10/69, TOMAS ALVAREZ, 1662 Park Avenue, NYC, was interviewed at

the NYO in Spanish by SAS H. CURTISS BURRELL, WILLIAM J. CANALEZ and PAUL J. BRANA. During the course of this interview, SA MICHAEL WILLIAMSON was also present.

ALVAREZ advised that he had been enlisted by his son-in-law JUAN NIEVES MONSSERRAT aka "Papo", to assist him in past-posting several numbers in the "Spanish" RAYMOND numbers operation. ALVAREZ said that he had once a week for the past three weeks past-posted several numbers. Last week, approximately 12/4/69, he past-posted some numbers and was then advised by his controller, PETER RIVERA, known to him as "PETIE", that these hits would not be paid. On 12/8/69, at approximately 6-6:30 PM, PETER RIVERA, accompanied by ANGEL LUIS, picked up ALVAREZ in front of Johnny's Bar on 116th Street and then went to MONSERRAT'S home and picked him up. "PETIE" advised that

they had to go to the "office" in order to get the matter of these hits straightened out. At this time, ALVAREZ said that he was not aware that RAYMOND MARQUEZ was aware of the past-posting which had been occurring. ALVAREZ was not positive of exactly where he was taken since it was dark and since he had never been in that area before; however, he felt it was on the west side of the City, possibly in the 8th Avenue and 113th Street area. When they arrived, MONSSERRAT went into an apartment with "PETIE". ALVAREZ remained in an adjoining or adjacent flower shop accompanied by ANGEL LUIS and an individual known to him as "JUNIOR". A short time thereafter, ALVAREZ was told to go into the apartment which he did. Seated behind the desk looking through some numbers papers was RAYMOND MARQUEZ. Also seated in a chair on the other side of the desk was MONSSER-

RAT. Standing were "PETIE" and an individual whom ALVAREZ felt was Italian and later identified a photograph of ANTHONY ANGELET as this person.

It quickly became apparent to ALVAREZ that MONSSERRAT had told the entire story to MARQUEZ and ANGELET in the presence of "PETIE". ANGELET, in English, then cursed and threatened bodily harm to ALVAREZ. ANGELET pushed him twice and told him that he was responsible for this past-posting. ANGELET made a threatening gesture as if to pick up a steel bar which is used as a brace across one of the doors in this apartment. He also revealed to ALVAREZ a revolver which was tucked inside his belt. ALVAREZ was advised that he had to come up with $2,300 or else.

ALVAREZ said that he and MONSERRAT left this meeting quite shaken since they felt that MARQUEZ and ANGELET meant

business inasmuch as they had told them that they could not get away with this, otherwise other runners and controllers might attempt the same thing.

Additionally, ALVAREZ advised that "PETIE" had called MONSSERRAT's wife at home and told her that the office people were getting a little concerned about the money. ALVAREZ said that on 12/9/69, he paid "PETIE" $1,000 of the $2,300 which he was supposed to pay back.

MONSSERRAT left on 12/9/69 for Puerto Rico in order to obtain the money which he has to pay back to MARQUEZ and ANGELET. This sum is believed to be between $8,000 and $9,000. ALVAREZ was led to believe that MONSSERRAT told MARQUEZ at this meeting that he would have to go to Puerto Rico in order to obtain this money. MONSSERRAT is due to return to the New York City area either during the PM of 12/10/69 or the AM of

12/11/69.

It is recommended that a new case be opened and assigned re this matter.

FEDERAL BUREAU OF INVESTIGATION

Date 12/22/69

The following signed statement was furnished to Special Agents PAUL J. BRANA, JOSE LUIS CARRERA, HENRY GARCIA and JAMES GARCIA of the Federal Bureau of Investigation (FBI) at the New York Office of the FBI by JUAN NIEVES-MONSERRATE.

The below statement was made in the Spanish language and was read and signed by JUAN NIEVES-MONSERRATE.

Set forth below is an English translation of the above-referenced statement:

On 12/15/69 at New York, New York

File # NY 166-2685

SAS WILLIAM J. CANALEZ, PAUL J. BRANA, JAMES GARCIA, HENRY GARCIA, JOSE LUIS CARRERA/wjc

by _____ Date dictated 12/17/69

EXHIBIT B

"I, Juan Nieves Monserrate, reside at 1662 Park Avenue, Apartment #35, New York, New York, and make the following statement voluntarily to Misters Henry Garcia, Jose Luis Carrera, James Garcia and William J. Canalez, who have identified themselves as Special Agents of the Federal Bureau of Investigation (F.B.I.). I was born May 20, 1945 in Juncos, Puerto Rico and I went to school until the ninth grade.

"My father-in-law Tomas Alvarez and I worked in a bolita operation. I delivered numbers to a person named Ramon.

"On Monday, December 8, 1969 Ramon accused me of 'cheating' because I made a late delivery. I knew he was going to accuse me of this, because on Sunday December 7, 1969, 'Petey' came to my house and told me there was a problem with the bolita operation, which I was taking to the bank. I went to the Bolita Bank six

times a week, after I picked up the envelopes from the runners.

"Petey told me thsat the problem had to be corrected and that they were accusing me of cheating with the envelopes that I was delivering daily to the bank. Petey told me that the following night, he and I would have to go talk to Ramon about this problem.

"On Monday night around seven o'clock Petey picked me up at Park Avenue and 117 Street. We went to the bank in Petey's car (?) the luncheonette 'Charlie A Go-Go', located on Eighth Avenue between 112 Street and 113 Street. When we went in the luncheonette, Ramon told me to go with him and he took me to a room towards the rear of the luncheonette. When I entered the room I met an individual who is known as "El Italiano'. (The Italian).

"Ramon spoke first and he showed me some collections, and he told me that I

was getting there late with the collections so I could put the numbers in the envelopes which had the best possibilities of winning the prize. After Ramon accused me of this I explained to him that this was not true, that I got to the bank between 2:00 and 2:15.

"Ramon added the amount of money, that he told me I owed from the prizes which he said I had 'fixed' illegally - a sum of 8 thousand and 900 dollars.

"El Italiano then told me to go to Puerto Rico immediately to pick up the money, since I had told them, that I had the money there. El Italiano told me 'Go to Puerto Rico and get the f____g (obscene) money, you mother f_____r (obscene).' He repeated this two or three times.

"Ramon told me to go to Puerto Rico to get the money that I had sent to

Puerto Rico on Sunday, December 7. I had sent $7,600.00 to Puerto Rico with my brother Asuncion Nieves on December 7.

"Ramon told me 'You know who you are playing with here. Better that you go to Puerto Rico and get the money so as to avoid problems'. Ramon told me that I had to get $4,500. from one collection and $4,400. from another collection, a total of $8,900. money which he inferred I had stolen.

"Ramon accused me of getting there after the first two numbers had come out and adding to all the envelopes a 'run-down' from zero to nine to the first two numbers.

"I remember Ramon accused me of 'fixing' the numbers 118, 685 and 316 as well as others, and of putting these numbers in the collection after I had found out what the first two numbers were.

"After this, Ramon called Petey

and Tomas Alvarez.

"El Italiano told Petey to shut up or he would put a bullet through his head. Ramon accused me of being in a 'plot' with the people from whom I collected the bolita envelopes.

"I told Ramon that I had nothing to do with them, because I hardly knew any of them.

"Tony told me to go to Puerto Rico rightaway and get the money. I told him I couldn't go because my children were sick. El Italiano told me that this was not their problem.

"El Italiano left and I told Ramon that I would get the money but that I needed time because I had to take care of my children. Ramon told me that if he had to pay the money I was going to have problems with them. Ramon told me that if he had to put up the money for me, they would know and would continue to

bother me.

"While we were at the luncheonette, when my father-in-law, Tomas Alvarez, came, El Italiano picked up an iron bar and made as though he was going to hit my father-in-law. He said to my father-in-law 'I am going to put this through your chest'. He called my father-in-law 'a son-of-a-bitch'.

"My father-in-law worked for Ramon for many years as a bolita collector. About two years ago, my father-in-law asked Petey, who was a runner for Ramon, if I could work with Petey. I started to work with Petey two years ago collecting envelopes. I made $65. a week and I went to six houses to collect the envelopes. The six envelopes were marked differently. Two of the envelopes had the letter 'J'. One envelope had the letter 'N'. One envelope had the letter 'V'. Another envelope was marked '7PP'

and the other one 'S35'. (?)

"I have identified photographs of Ramon Marques as the individual named Ramon and photographs of Anthony Angelet as the individual I met as 'El Italiano'.

"I have read this statement which consists of this page and six others. It is the truth and I sign it voluntarily."

"/s/ Juan Nieves-Monserrate"

"Witness:
Paul Brana, Special Agent, FBI, NYC, 12/15/69"
William J. Canalez, Special Agent, FBI, NYC, 12/15/69
Henry Garcia, Special Agent, FBI, NYC, 12/15/69"

APPENDIX D

AFFIDAVIT OF ASSISTANT UNITED STATES ATTORNEY FITZPATRICK OF AUGUST 7, 1981

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - x

THE UNITED STATES OF AMERICA,	:	SUPPLEMENTAL AFFIDAVIT
-v-	:	70 Cr. 113 (EW)
RAYMOND MARQUEZ,	:	
Defendant.	:	

- - - - - - - - - - - x

STATE OF NEW YORK)
COUNTY OF NEW YORK : SS.:
SOUTHERN DISTRICT)
OF NEW YORK

THOMAS FITZPATRICK, being duly sworn, deposes and says:

I am an Assistant United States Attorney and Chief of the Criminal Division in the office of John S. Martin, Jr., United States Attorney for the Southern District of

New York, and I am familiar with the facts and circumstances set forth herein.

I was an Assistant United States Attorney in the Southern District of New York in 1970, and I was the attorney in charge of prosecution of petitioner. At no time prior to, during or after the trial did either Juan Nieves Monserrate or Tomas Alvarez disclose to me that he had cheated petitioner's gambling business. In fact, during pre-trial conferences, I specifically questioned Mr. Monserrate and Mr. Alvarez as to whether either of them had cheated petitioner's business. Each time the question was asked, both Mr. Monserrate and Mr. Alvarez steadfastedly denied cheating petitioner.

Until the post-trial hearing before Judge Weinfeld in 1973, I was not apprised of any evidence which would indicate that Mr. Monserrate's and Mr. Alvarez' testimony on this point was false.

I never saw or heard of the December 10, 1969 F.B.I. Memorandum indicating that Alvarez admitted cheating until sometime in 1981. That apparently internal document was never turned over to the United States Attorney's Office until 1981. Moreover, no F.B.I. Agent ever indicated to me that Mr. Alvarez had admitted that he and Mr. Monserrate had cheated the Marquez numbers operation.

/s/ Thomas Fitzpatrick
THOMAS FITZPATRICK

Sworn to before me this
7th day of August, 1981

APPENDIX E

AFFIDAVIT OF ASSISTANT UNITED STATES ATTORNEY FITZPATRICK OF MARCH 26, 1981

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA :

-v- AFFIDAVIT

RAYMOND MARQUEZ, 70 Cr. 113 (EW)

Defendant.
----------x

STATE OF NEW YORK)
COUNTY OF NEW YORK :ss.
SOUTHERN DISTRICT OF NEW YORK)

THOMAS J. FITZPATRICK, Being duly sworn deposes and says:

I am an Assistant United States Attorney and Chief of the Criminal Division in the office of John S. Martin, Jr., United States Attorney for the Southern District of New York, and I am familiar with the facts and

circumstances set forth herein.

I was an Assistant United States Attorney in the Southern District of New York in 1970, and I was the attorney in charge of the prosecution of petitioner. At no time prior to or during trial did Juan Nieves Monserrate disclose to me, or, to my knowledge, to any other government official, that he had cheated petitioner's gambling business. In fact, during pre-trial conferences, I specifically questioned Mr. Monserrate as to whether he had cheated petitioner's business. Each time the question was asked, Mr. Monserrate steadfastly denied that he had cheated petitioner.

Until the post-trail hearing before Judge Weinfeld in 1973, I was

not apprised of any evidence which would indicate that Mr. Monserrate's testimony on this point was false.

Attached hereto as Exhibit A is an FBI report dated December 18, 1969 which states that the FBI had received information that Mr. Monserrate and his father-in-law, Mr. Alvarez had cheated the Marquez numbers operation. This report was directed to me, and I must have received it although I have no recollection of it. Since I was aware from the inception of the case that Mr. Marquez had accused Mr. Monserrate of pastposting, this report could not

have constituted corroborating evidence of the accusation.

/s/ Thomas J. Fitzpatrick

THOMAS J. FITZPATRICK

Sworn to before me this
26th day of March, 1981.

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

Copy to: 2 - USA, SDNY (ATTENTION: THOMAS J. FITZPATRICK, ROOM 420)

Report of: Office: New York,
Date: 12/18/69 New York

Field Office File #: 166-2685

Bureau File #:

Title: RAYMOND MARQUEZ;
ANTHONY ANGELET;
PEDRO RIVERA;
ANIBAL CARRION

Character: INTERSTATE TRANSPORTATION IN AID OF RACKETEERING - GAMBLING; INTERSTATE TRANSPORTATION IN AID OF RACKETEERING - EXTORTION

Information developed on 12/9/69 indicating that RAYMOND MARQUEZ, ANTHONY ANGELET and PEDRO RIVERA were threatening one JUAN NIEVES-MONSERRATE and his father-in-law, TOMAS ALVAREZ. Authorized complaints filed 12/11/69 charging MARQUEZ, ANGELET and RIVERA with violation T18, Sections 371 and 1952, USC. MARQUEZ and ANGELET arrested by [redacted] agents, NY, NY,

EXHIBIT A

12/11/69. MARQUEZ remanded to the custody of USM in lieu of $100,000 bail on 12/12/69. ANGELET released on $25,000 bond same date. On 12/15/69, MARQUEZ remanded to Federal custody under provisions T18, USC, Sec. 3148, Bail Reform Act. On 12/15/69, authorized complaint filed charging ANIBAL CARRION with violation T18, Section 371 and 1952, USC. RIVERA and CARRION surrendered to Bureau Agents in company of their attorneys as a result of intensified investigation by NYO. RIVERA remanded to custody of USM in lieu of $25,000 bail and CARRION released on $25,000 bond 12/16/69. Preliminary hearing scheduled for 12/23/69.

DETAILS:

This investigation was predicated upon the receipt of information on December 9, 1969, by agents of the New York Office that an individual known as "PAPO", later identified as JUAN NIEVES-MONSERRATE, and his father-in-law, TOMAS ALVAREZ, both employees of the RAYMOND MARQUEZ Numbers Operation, had been engaged in past-posting activities and had subsequently been threated by ANTHONY ANGFLET in the presence of RAYMOND MARQUEZ. NIEVES was instructed by ANGELET and MARQUEZ to repay swindled funds in excess of $9,000 and to travel to Puerto Rico where NIEVES advised he could obtain some repayment funds.

The following investigation was conducted by Special Agents and on December 10, 1969, at the Eastern Airlines faclity at John F. Kennedy International Airport, New York, New York.

Advised that a review of the manifest for Eastern flight number 927, New York to San Juan, on October 9, 1969, reflected a reservation for San Juan. Records further reflected that the ticket issued to NIEVES was purchased through the Rivera Brothers Travel AGency, 1672 Madison AVenue, New York City, telephone number 427-8800.

A review of the manifests for incoming flights from San Juan on December 10, 1969, reflects that one JUAN NIEVES was ticketed on Eastern

flight number 926, due to arrive at John F. Kennedy at 10:35 P.M.

The San Juan Office telephonically advised that records of Eastern Airlines, San Juan, reflect that NIEVES did board flight number 926 on December 10, 1969, for New York, in coach accommodations. Eastern records further reflect that NIEVES purchased a round-trip ticket, New York to San Juan and return.

Radio communication was established with Eastern Airlines Flight Number 926 and NIEVES was identified through a pretext ticket check while en route.

The following physical and descriptive information regarding passenger JUAN NIEVES was obtained and furnished by the crew of flight number 926:

Name	JUAN NIEVES
Race	White, Puerto Rican
Sex	Male
Age	Twenty-five
Hair	Dark, wavy
Characteristics	Wears mustache
Clothing	Brown suit Gold knit shirt Raincoat
Seat	Number 19F

Flight Number 926 arrived at John F. Kennedy Airport, Eastern Airlines gate number 16 at approximately 11:35 PM and was met by Eastern Supervisor and Special Agents. NIEVES was identified to the Special Agents upon departing the aircraft and he was met at the bottom of the passenger ramp. Thereafter, he identified himself as JUAN NIEVES-MOSERRATE.

On December 11, 1969, Assistant United States Attorney MALONEY, Southern District of New

York, authorized arrest warrants for RAYMOND MARQUEZ, ANTHONY ANGELET and PEDRO RIVERA for violation of Title 18, United States Code, Sections 371 and 1952 and authorized complaints filed December 11, 1969, before United States Commissioner EARLE N. BISHOPP, Southern District of New York, by a Special Agent, Assistant United States Attorney MALONEY on December 11, 1969, also gave verbal authorization for the arrest on the same charges as stated above for any other individual or individuals who might take part in the conspiracy to obtain the money from the victim, JUAN NIEVES-MONSERRATE.

It should be noted that after it was determined that subject, CARRION, came into possession of victim's money, Assistant United

States Attorney MALONEY was telephonically contacted at the Southern District of New York. MR. MALONEY verbally authorized the arrest of subject CARRION for violation of Title 18, United States Code, Sections 371 and 1952.

APPENDIX F

DISTRICT COURT'S OPINION DENYING THE MOTION FOR AN ORDER PURSUANT TO 28 U.S.C. §1651

- - - - - - - - - - - x

THE UNITED STATES OF AMERICA, : 70 Cr. 113

: OPINION

-v-

:

RAYMOND MARQUEZ,

:

Defendant.

- - - - - - - - - - - x

JOHN S. MARTIN, JR. ESQ.
United States Attorney for the
Southern District of New York
One St. Andrew's Plaza
New York, New York

Attorney for THE UNITED STATES
OF AMERICA

MICHAEL S. FELDBERG, ESQ.
Assistant United States Attorney
Of Counsel

GOLDBERGER, FELDMAN, DUBIN & YOUNG
401 Broadway, Suite 306
New York, New York

Attorney for Petitioner
RAYMOND MARQUEZ

MICHAEL YOUNG, ESQ.
Of Counsel

EDWARD WEINFELD, D. J.

The petitioner, Raymond Marquez, the "banker" of a numbers operation in Harlem, was convicted in December 1970 of the crime of forcing by extortionate threats,[1] Juan Nieves Monserrate, one of his "runners" in the operation, to travel from New York to Puerto Rico and to return with funds that had been sent there by Monserrate. Marquez now moves, more than ten years after his conviction and after he has served the three-year sentence imposed upon him, for a writ of error coram nobis to vacate his judgment of conviction. Familiarity is assumed with the opinion of the

(1) Marquez and two co-defendants were convicted of violations of 18 U.S.C. § 1952 and 18 U.S.C. § 371.

Court of Appeals affirming his conviction,[2] and this Court's subsequent opinion denying petitioner's motion for a new trial.[3]

The motion for a new trial was based upon the ground that Monserrate and Alvarez, his father-in-law and also a "runner," perjured themselves at the trial by their denials that they had cheated the operation. Petitioner and co-defendant Angelet did not testify at the trial. The third defendant, Pedro Rivera, a "controller" in the gambling operation, testified that

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(2) 449 F.2d 89 (2d Cir. 1971), cert.denied, 405 U.S. 963 (1972).

(3) 363 F.Supp. 802 (S.D.N.Y. 1973), aff'd mem., 490 F.2d 1383, cert. denied, 419 U.S. 826 (1974).

Monserrate had admitted cheating and that no threats were made to induce Monserrate to go to Puerto Rico and that he went there voluntarily to obtain and return the money.

At the the evidentiary hearing on the motion for a new trial, Monserrate acknowledged that, contrary to his trial testimony, he did cheat the gambling operation. The Court, for reasons set forth in its opinion, denied the motion for a new trial.

The instant application centers essentiallly upon the same ground upon which petitioner's prior motion for a new trial was based, to wit, the perjury of Monserrate and Alvarez; however, this time petitioner enlarges his claim and charges that not only was their perjury at the

trial known to government agents but that the government agents themselves committed perjury at the trial and the hearing on petitioner's motion for a new trial; and, further, that the government failed to disclose prior to and during the trial documents to which he was entitled under Brady v. Maryland,[4] or pursuant to 18 U.S.C. § 3500 and Rule 16 of the Federal Rules of Criminal Procedure. Accordingly, he contends that the government violated his right to due process of law and seeks vacatur of his judgment of conviction.

Petitioner initially based his motion upon a telex dated December 12, 1969 ("telex"), prepared by the

(4) 373 U.S. 83 (1963).

agent of the FBI in charge of the criminal division,[5] drawn from information contained in the FBI files relating to the investigation of the charges against petitioner. The telex is a lengthy summary of the origin of the investigation and subsequent events. It includes reference to questioning of Monserrate at Kennedy Airport upon his return from Puerto Rico with the money, proposed action by the United States Attorney, plans to apprehend Marquez and alleged co-conspirators upon delivery of the extorted money, the protection of lookouts and the failure by FBI agents to apprehend one Anibal Carrion, to

(5) This was obtained by petitioner under the Freedom of Information Act, 5 U.S.C. § 522 (1977 & Supp. 1978).

whom Marquez gave the money after it was delivered to him by Monserrate, and who managed to leave the scene of the crime unapprehended by surveillance agents. Despite an intensive search, Carrion was unavailable at the time of petitioner's trial. The telex, among other matters, states:

> After a penetrative interview, Nieves [Monserrate] finally admitted his involvement in the situation [as outlined by Alvarez][6] and reluctantly agreed to cooperate. He stated he had recovered Seven Thousand Four Hundred Thirty Five Dollars of the money swindled from Marquez and had brought that amount with him [emphasis supplied].

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(6) This was originally deleted; the inserted matter was furnished after the argument of the motion.

Stressing this excerpt, petitioner urges it supports his claim for the voiding of the judgment of conviction on the grounds here advanced.

The government in response to petitoner's motion, made available other FBI documents upon which he also relies to support his current charges. One, is the FBI report of an interview with Alvarez on December 10, 1969 in which Alvarez admitted that he and Monserrate had "past posted"[7] bets in the Marquez operation. The December 10 report was offered by the

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(7) "Past posting" is a form of cheating. It involves placing a bet on the numbers after one or more of the winning three digits has already been determined, thereby greatly enhancing the bettor's chance of winning.

government as the only source reference to "the money swindle from Marquez" contained in the December 12, 1969 telex.

The government does not dispute that the two documents, the December 10, 1969 report and the telex, reveal that Alvarez told the agents that Monserrate had cheated the numbers operation by past posting; it does dispute that they indicate that Monserrate himself admitted the cheating prior to or during the trial. It emphasizes that the December 10 report refers only to Alvarez' own statement or admission.

As to the December 12 telex, the government also contends that it does not establish that Monserrate himself made the statement that the

money was "swindled from Marquez." Rather, it contends that this was the language reflecting the conclusion of Richard Baker, Special Agent in charge of the Criminal Division of the New York FBI office, who prepared the telex as a summary report of all matters pertaining to the investigation based on reports by FBI agents who in fact were active in the investigation and eventual prosecution of Marquez. It is represented on this motion that Baker has no present recollection of the case but since the telex bears his initials, he either prepared or approved it but does not recall what he meant by the phrase "swindled from Marquez"; that he does not recall if he inserted the phrase based upon information derived from an

informant, Alvarez or Monserrate or was based upon reports prepared by agents working on the case. The government urges that the most plausible explanation is that Baker coined the expression himself either based upon statements of cheating by an informant or Alvarez, rather than that it was based upon anything Monserrate said since there is an absence of any material in the government files prior to 1973 that Monserrate admitted the cheating and further that he consistently, both prior to and during the trial, denied the charge to government agents and the Assistant United States Attorney.

Thomas J. Fitzpatrick, the Assistant United States Attorney who prosecuted the case, affirms his

testimony given on petitioner's motion for a new trial that at no time prior to, during or after the trial, did either Monserrate or Alvarez disclose to him that Monserrate had cheated petitioner's gambling business; that during pre-trial conferences he specifically questioned them on the subject and on each occasion each steadfastly denied the cheating; and that it was not until the post-trial hearing in 1973 that he first learned of any evidence that would indicate their testimoney at the trial on this subject was false. Further, he swears that he never saw or heard of the December 10, 1969 FBI report, an internal FBI document, until sometime in 1981 when it was turned over to the United States Attorney's office in

connection with this motion; finally, he swears that no FBI agent ever indicated to him that either Monserrate or Alvarez admitted they had cheated the numbers operation.

A second report submitted by the government on this motion, dated December 18, 1969, is attached as an Exhibit to Mr. Fitzpatrick's affidavit. The December 18 report states, among other matters, that the FBI received information that Monserrate and Alvarez "had been engaged in past-posting activities and had subsequently been threatened by Anthony Angelet in the presence of Raymond Marquez." Fitzpatrick states that since the report bears a notation that it was directed to his attention, he must have received it, although he

has no recollection that in fact he did; that since he was aware from the inception of the case that Marquez had accused Monserrate of past-posting, the report could not have contributed corroborating evidence of the accusation.

Petitioner also relies upon the statement in the December 18 report to support his claim of prosecutorial misconduct. The government, however, contends that the report was turned over to the petitioner at the trial as § 3500 material and thus he had information paralleling that which he now relies upon to support his charges. Petitioner, however, disputes that the report was delivered to the defense in its entirety and contends that the

portion quoted above was excised. The trial record is not altogether clear on the matter.[8] However, this report is hereafter referred to in the discussion of the materiality of the reports of December 10 and December 12, which the government concedes were not disclosed to petitioner.

The government, in further support of its position that the

(8) The record indicates that the December 18 report was introduced as Exhibits 3504 and 3507. Transcript at 292-93. Exhibit 3504 contains pages two to four of the report with the first paragraph of page two excised. The government contends that the entire report was introduced as 3507. In offering Exhibit 3507 into evidence, however, Mr. Fitzpatrick described it as "another portion of that report dated Dec. 18, 1969." Transcript at 293. It is unclear, therefore, whether Exhibit 3507 contained the material in question.

prosecution was unaware of the falsity of Monserrate's and Alvarez' testimony, has submitted a translation of an interview with Monserrate on December 15 in which he describes events leading to the direction by Marquez that he go to Puerto Rico and states that when Marquez accused him of cheating, he said it "was not true." The statement is typical of others made by Monserrate prior to and during the trial denying the accusation that he had cheated the Marquez gambling operation.

At a conference called by the Court following argument of this motion, the petitioner was offered an opportunity of a hearing to question the agents, the Assistant United States Attorney or any other witnesses

whose testimony may be pertinent to the issues raised by petitioner, but this was declined and petitioner's counsel stated he preferred to rely upon the affidavits and the record as submitted on this motion.

The first issue to be decided is whether, as now charged by petitioner, the Assistant United States Attorney who prosecuted the case and the FBI agents who investigated and worked on the case knowingly permitted the use of false testimony by Monserrate and Alvarez at the trial in their denials of cheating; whether those FBI agents who testified at the trial themselves committerd perjury on that issue and whether they again, as well as the Assistant United States Attorney,

committed perjury at the hearing of the motion for a new trial when they denied that Monserrate and Alvarez had prior to or during the trial admitted cheating the policy bank. Upon the motion for a new trial, the Court had the benefit of the demeanor of witnesses. At that hearing, Monserrate admitted his trial testimony was false. His explanation was that he was in fear of his life or injury to him and to members of his family because of threats made by Marquez and Angelet, accompanied by an assault with an iron rod by Angelet upon Alvarez, his father-in-law; that "he felt he was in jeopardy; that there had been talk of putting bullets through people; and he was afraid of both Marquez and Angelet; further,

that at the time of the trial, a relative, whom he regarded as his mother, was dying; his wife was in the hospital, and with troubles in the case, he 'wouldn't have cared if [he] had died.'"[9] He testified that he had never told any enforcement official that he cheated prior to a discussion he had with a FBI agent in late 1972 when interviewed in connection with the motion for a new trial. The Court, upon a review of the hearing testimony and the then existing record, found that there was no prosecutorial misconduct and accepted the testimony of the FBI agents and the Assistant United States Attorney that Monserrate refused to

(9) United States v. Marquez, 363 F.Supp. 802, 805 (S.D.N.Y. 1973).

admit, and had repeatedly denied, that he had cheated during the interrogations prior to the trial. Upon a consideration of all matters presented to the Court on the current motion, the Court has no reason to change its view of the credibility of the government officials, their probity as witnesses, or its conclusion that they were unaware of the false swearing by Monserrate and Alvarez at the trial. The documents relied upon by petitioner require no change of view.

To place matters in proper focus it must be emphasized, as it was at the trial, tht the charge against petitioner and his co-defendants centered about extortionate acts and conduct. While inquiry into the

alleged cheating was proper in an attack upon the credibility of Monserrate and Alvarez, this Court was of the view that it was an attempt to becloud the basic issue in the case and to divert the jury's attention from it; indeed, the issue was specifically drawn to the jury's attention by the Court in its charge; the jury was instructed that even if it found that Monserrate had cheated the policy operation, it did not justify extortionate means to obtain the return of the money and that Monserrate's alleged cheating was not a defense to the charge.[10] The cheating issue was totally unrelated to the guilt or innocence of the

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(10) Id. at 806.

defendants, and was, as the FBI agents who testified at the hearing noted, "insignificant" and "not really relevant to the investigation they were conducting," with respect to the charge of interstate travel by extortionate methods.[11]

In the circumstances, it is understandable that the reports that are the predicate for petitioner's motion were overlooked either inadvertently or due to a breakdown in communication between the prosecution and the FBI.[12] Other than petitioner's and his counsel's averments, there is nothing to support

(11) Id.

(12) Cf. United States v. Pacelli, 491 F.2d 1108, 1119 (2d Cir.), cert. denied, 419 U.S. 826 (1974).

the charge that the reports were knowingly and intentionally withheld from petitioner at his trial, or the more serious charge tht government agents knowingly used perjured testimony at the trial, that they themselves gave false testimony upon the trial and at the hearing for a new trial. The Court finds upon the entire record that their testimony of what Monserrate and Alvarez told them or failed to tell them with respect to cheating the policy operation was truthful in all respects.

There remains, however, to be considered the significance of the government's failure to deliver to petitioner the FBI report of December 10, 1969 and the December 12, 1969 telex and the standard of materiality

to be applied in deciding whether petitioner, by reason of such nondisclosure, was deprived of his constitutional right to due process. The government concedes that the fact that Alvarez stated on December 10 he and Monserrate had cheated the policy operation should have been disclosed to Marquez, as well as the report itself which contains the information.[13]

As to the telex of December 12, the government's position is that

(13) It appears that this report, an internal FBI document, was not turned over to the United States Attorney's office until 1981. The prosecution concedes that this does not excuse the government's failure to disclose the information to petitioner at or prior to the time of his trial. See Giglio v. United States, 405 U.S. 150, 154 (1972).

since the document is a report of Baker, a senior FBI officer reviewing the actions of agents, disclosure was not required because it was neither a document discoverable under Rule 16 of the Federal Rules of Criminal Procedure nor a statement of a witness within the meaning of 18 U.S.C. § 3500. The government concedes only that it was "required by Brady to reveal the fact that Alvarez had admitted the cheating." The Court goes beyond and holds that in addition the government was required to disclose the telex reference that Monserrate "stated he had recovered Seven Thousand Four Hundred Thirty Five Dollars of the money swindled from Marquez and had brought that amount with him." In any event, the

government's position is that the failure to disclose the documents or the information contained therein did not deprive defendant of his right to a fundamentally fair trial. For the purpose of this motion the Court assumes (although as already noted there is a dispute as to whether the previously quoted portion of the December 18 report was delivered to him at the trial) that it was excised and hence not disclosed and that it

should have been disclosed.[14]

The fact that documents or information should have been disclosed to defense counsel is not dispositive of petitioner's application. The failure to do so does not

> automatically require a new trial whenever "a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict ... " United States v. Keogh, 391 F.2d 138, 148 (CA2 1968). A finding of materiality of the evidence is required under Brady,

(14) Although petitioner purports to rely upon the alleged failure to disclose fully the December 18 report, it is significant that he concedes the alleged omitted material "contains no mention of the [alleged] fact that both Alvarez and Monserrate had confessed to the agents that they had been involved in a past-posting scheme." Young affidavit, dated August 25, 1981.

> supra, at 87. A new trial is required if "the false testimony could ... in any reasonable likelihood have affected the judgment of the jury ...."(15)

Moreover, the Supreme Court has cautioned that coram nobis relief should be granted "only under circumstances compelling such action to achieve justice"[16] and "justice does not demand a conviction be overturned if suppressed evidence would not have assisted the defendants when all the facts were developed."[17] The "omission must be evaluated in the

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(16) United States v. Morgan, 346 U.S. 502, 511 (1954).

(17) United States v. Keogh, 417 F.2d 885, 887 (2d Cir. 1969); see also United States v. Keogh, 391 F.2d 138, 148-49 (2d Cir. 1968).

context of the entire record."[18]

This Court's finding that there was no prosecutorial misconduct rules out a strict test of materiality. Nonetheless, the Court is prepared to apply the most stringent test of materiality -- that petitioner's conviction must be set aside if there is any reasonable likelihood that the nondisclosed material could have affected the judgment of the jury.[19] Stating it perhaps somewhat differently, would knowledge of the information contained in those reports have permitted their use by petitioner's experienced trial counsel, through cross-examination,

(18) United States v. Agurs, 427 U.S. 97, 112 (1976).

(19) Id. at 103, 106.

trial strategy, presentation of the defense or summation to the jury, so that in end result there was a significant chance it would have caused a single juror to entertain a reasonable doubt?[20]

At the outset it is noted that none of the material is in anywise exculpatory of petitioner; most of it is inculpatory. Additionally, there is no direct statement by Monserrate admitting he had cheated the gambling operation in any of the undisclosed reports. But, it cannot be denied that they could have been used for further

(20) Cf. United States v. Sperling, 506 F.2d 1323, 1333 (2d Cir. 1974), cert. denied, 420 U.S. 962 (1975); United States v. Miller, 411 F.2d 825, 832 (2d Cir. 1969).

cross-examination to impeach witnesses on the claim of cheating. However, this matter, as the Court noted, was "exaggerated far out of proportion to its significance as to the essential elements of the crime charged, and while proper on the issue of credibility was patently an attempt to becloud the issue"[21] and "was tangential to the principal issues; it went principally to credibility; it did not touch upon the essential elements of the crime."[22] Petitioner presses that possession of the reports not only could have been availed of for impeachment of Monserrate, the principal witness, but would have

(21) United States v. Marquez, 363 F.Supp. at 807.

(22) Id. at 807.

served another valuable purpose in support of the defense. He argues knowledge of the undisclosed reports would have enabled the defense to persuade the jury that Monserrate, aware that petitioner knew of the cheating, voluntarily and as a matter of conscience went to Puerto Rico of his own free will and returned with the money and that he did not travel there because of threats by petitioner and his co-defendant. This contention is, in the light of the totality of the evidence, utterly unrealistic and sheer rhetoric; as noted previously, it "approaches the incredible."[23]

This Court has a vivid recollection of the trial and in

(23) United States v. Marquez, 363 F.Supp. at 807.

addition, since the filing of this motion has re-read, word-for-word, the transcripts of the trial and the hearing on the motion for a new trial, and reviewed the appellate record. Viewed against the "actualities of a long" and "living trial,"[24] which include events preceding the "kangaroo court" when Monserrate was ordered to appear at the session later presided over by petitioner, aided by Angelet, his strong-arm man, the accusation of cheating, the demands for the return of the money, the threats of injury and harm to Monserrate, his family and Alvarez, accompanied by an assault by Angelet upon Alvarez with an iron bar,

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(24) Cf. Glasser v. United States, 315 U.S. 60, 88 (1942) (Frankfurter, J., concurring).

followed by Monserrate's immediate and hurried overnight plane trip to and from Puerto Rico, enveloped the trial in a miasma of threats, intimidation and the use of force if the money were not returned.

This Court is convinced to a moral certainty and beyond peradventure of doubt that if petitioner's counsel had had possession of the documents and the information which underlie this motion either before or at the trial, their use by defense counsel, whether for cross-examination of witnesses, or in summation, or to fashion any strategy, or to advance any defense, would not have caused a single juror to have a reasonable doubt as to petitioner's guilt or to vote other than guilty as

charged. In summary, there was no reasonable likelihood that the undisclosed material could have affected the judgment of the jury. The petition for a writ of error coram nobis is denied.

So ordered.

Dated: New York, New York
September 1, 1981

EDWARD WEINFELD
United States District Judge

APPENDIX G

COURT OF APPEALS ORDER AFFIRMING THE ORDER OF THE DISTRICT COURT

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 4th day of February, one thousand nine hundred and eighty-two.

Present:
Hon. James L. Oakes,
Hon. Ellsworth A. Van Graafeiland,
Circuit Judges,
Hon. Dudley B. Bonsal,
District Judge.

United States of America,
Appellee,

v. 81-1401

Raymond Marquez, 70-CR-113
Appellant.

O R D E R

Appeal from a denial of a petition for a writ of coram nobis by the United States District Court for the Southern District of New York, Edward Weinfeld, Judge.

Raymond Marquez was convicted in February, 1970 of causing by extortion, Juan Nieves Monserrate to travel from New York to Puerto Rico to obtain and return money which Marquez said Monserrate had cheated from Marquez's numbers racket. In August 1973, Judge Weinfeld denied Marquez's motion for a new trial, made on the basis that the government's principal witnesses, Monserrate and his father-in-law Alvarez, had perjured themselves at trial by stating that they did not cheat Marquez's operation. Even though Monserrate admitted he had lied, Judge Weinfeld found that even if Monserrate had testified at trial that he had cheated, "it would not have raised a reasonable doubt

in the mind of a single juror."

In September 1981, Judge Weinfeld denied Marquez's instant motion for a writ of error coram nobis to vacate his judgment of conviction. Marquez argued this time that he had been prejudiced not only by the perjury of Monserrate and Alvarez, but by the perjury of the FBI agents who had testified that those two had not admitted their swindle of Marquez, and also by the government's failure to disclose to the defense during trial certain documents suggesting that Monserrate might have admitted to FBI agents that he had swindled Marquez and engaged in "past-posting." Judge Weinfeld found that the FBI agents did not commit perjury at trial or at the new trial hearing, that the prosecutor did not knowingly use perjured testimony at trial or commit perjury at the new trial hearing, and that even if the December 1969 documents should have

been disclosed, coram nobis, like new trial, was not justified because "there was no reasonable likelihood that the undisclosed material could have affected the judgment of the jury." See United States v. Provenzano, 615 F.2d 37, 49 (2d Cir. 1980).

We have no reason to overturn Judge Weinfeld's conclusion that neither the agents nor the prosecutor lied when they denied that Monserrate had admitted to them that he had cheated Marquez. Their knowledge from Alvarez about this cheating explains the references in the December 1969 FBI documents, and the government states that the agents were never in a position to perjure themselves about Alvarez's admissions, at trial or at the new trial hearing, because they were never asked about Alvarez's admissions. Monserrate testified at the new trial hearing that he had never admitted his

cheating at trial or to the agents before trial, as he was afraid of Marquez and his associates. Judge Weinfeld apparently credited that testimony.

Nor does there seem to be any reason to overturn Judge Weinfeld's conclusion that the prosecutor did not knowingly permit the use of false testimony at trial, as he swore that Monserrate and Alvarez had denied their cheating to him and that the GBI had not turned over its internal documents to him before trial.

The court ruled that the undisclosed FBI documents were not material, and thus did not violate due process under Brady v. Maryland, 373 U.S. 87 (1963), even if judged by the strict test that the conviction must be set aside if there is any reasonable likelihood that the undisclosed documents could have affected the outcome. See United States v. Agurs, 427 U.S. 97, 112 (1976), see

also Ostrer v. United States, 577 F.2d 782, 786 (2d Cir. 1978), cert. denied, 439 U.S. 1115 (1979). Given the absence of prosecutorial misconduct or of a specific request at trial by Marquez's defense counsel, this standard was more stringent than necessary and so gave Marquez the benefit of the doubt. The court found that it was immaterial whether the defense was given evidence from which it might show that Monserrate was lying on the stand when he denied his cheating, because this was irrelevant to proof of Marquez's extortion. There is no reason to think that the jury would have acquitted Marquez of extorting Monserrate if it believed Monserrate to be a cheat; if anything, proof of cheating would have increased Marquez's motivation to use the threat of force (Angelet's long iron bar). The jury might have believed Monserrate to be a

cheat anyway in light of the defense's evidence, and the jury was instructed that Monserrate's alleged cheating was not a defense to the charge against Marquez. Nor is there any reason to think that impeaching Monserrate's and Alvarez's testimony by showing that they lied about their cheating (perhaps in some hope of protecting themselves) would have discredited the rest of their testimony or undercut the other circumstantial evidence against Marquez.

Judgment affirmed.

/s/ James L. Oakes,

/s/ Ellsworth A. Van Graafeiland
Circuit Judges.

/s/ Dudley B. Bonsal
District Judge.

FILED
FEB 04 1982
A. DANIEL FUSARO, CLERK
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT